

THE YALE LAW JOURNAL

EDITORIAL BOARD

LOUIS H. POLLAK
Editor-in-Chief

ADAM YARMOLINSKY
Article Editor

JOHN L. HANNAFORD
HOWARD R. SACKS
Comment Editors

SETH C. TAFT
Case Editor

ARCHIE E. ALBRIGHT, JR.
JOHN BARKER
ALEX. BROOKS
MERRELL E. CLARK, JR.
REUBEN G. CLARK, JR.
JOHN W. DOUGLAS

FRANKLIN N. FLASCHNER
Managing Editor

ISAAC N. GRONER
HAROLD H. HEALY, JR.
FREDERICK W. JAQUA
MARY G. JONES
BAYLESS A. MANNING
BYRNE F. MARTIN
E. JOSEPH MORGAN

MARVIN S. CHAPMAN
JOHN S. WALKER
Note Editors

LEON SILVERMAN
Book Review Editor

ORIN S. PURINTON
BERNARD L. SANOFF
PAUL J. SHERMAN
JOHN V. THORNTON
JAY H. TOPKIS
DANIEL W. WEST

MARIE McMAHON, *Business Secretary*

Subscription price \$5.00 per year

This number, \$1.00

*Canadian subscription price \$5.50 per year; Foreign, \$5.75 per year;
for prices on other issues inquire*

Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

SALES BELOW COST PROHIBITIONS: PRIVATE PRICE FIXING UNDER STATE LAW

ALTHOUGH a free market is vital to free enterprise, competitors exposed to forces of that market are prone, as Adam Smith was only the first to observe,¹ to devise schemes for market regulation even while they exalt the theoretical virtues and practical desirability—in other industries—of markets which are free. Among the most recent, and in some areas the most effective, of such schemes has been the enactment in thirty-one states² of statutes which forbid the sale of goods at less than cost³ and which place

1. 1 SMITH, WEALTH OF NATIONS 135-6, 264-5 (Rogers' ed. 1869).

2. Ariz., Ark., Cal., Colo., Conn., Idaho, Kan., Ky., La., Me., Md., Mass., Mich., Minn., Mont., Neb., N. H., N. J., N. D., Ohio, Okla., Ore., Pa., R. I., Tenn., Utah, Va., Wash., W. Va., Wisc., Wyo. (see statutory citations at note 76 *infra*).

3. See generally 1 CALLMAN, THE LAW OF UNFAIR COMPETITION AND TRADE MARKS §§ 27.2-27.7 (1945); GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); OPPENHEIM, RECENT PRICE CONTROL LAWS (1939).

As a price control device, the statutes prohibiting sales below cost (commonly designated as "Unfair Practices" or "Unfair Sales" Acts) resemble the state "fair trade" (resale price maintenance) laws specifically sanctioned under federal law by the Miller-Tydings

enforcement of this prohibition in private hands. In demonstrating a loss of faith in the ability of an "unseen hand" to guide a complex economy, the statutes may seem to take their place beside other depression-stimulated legislative controls which have been imposed on the operation of the market.⁴ But they are markedly dissimilar in that they do not provide for public policing of a particular evil produced by free competition,⁵ but instead allow private groups to regulate free market forces over an indefinite area. Since, in the main, our economy still relies on competitive controls, and the federal anti-trust laws embody a dominant public policy in favor of competitive prices and unrestricted production, such statutes represent a departure which is both economically undesirable and of questionable constitutionality.

The statutes have their origin in recurrent attempts of competitors to prevent "destructive" price competition. The most obvious means of limiting such competition is the price-fixing agreement among competitors, but this has been categorically held to violate the Sherman Act.⁶ No remedy was provided at common law against injuries sustained from price reductions, whatever their purpose,⁷ and the emerging judge-made law of unfair com-

Amendment to the Sherman Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1940). The fair trade laws, however, deal only with branded goods, permitting vertical contracts between buyer and seller which require resale at designated prices, while the unfair practices acts limit price reductions horizontally in all types of goods, whether or not affected by contracts concerning resale. See FTC, REPORT ON RESALE PRICE MAINTENANCE (1945); HANDLER, CASES AND MATERIALS ON TRADE REGULATION 1091-5 (1937).

Although viewed legally as a protection of the brand name owner's interest, the resale price maintenance mechanism is realistically described as "a transparent mask . . . to conceal . . . prohibition of price competition." Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L.J. 607, 615 (1940). And see Note, *Monopolistic Competition and the Fair Trade Acts*, 14 TEMP. L.Q. 95 (1939).

Sales-below-cost prohibitions also resemble prohibitions against price discriminations between areas, types of buyers, etc., contained in numerous state laws (sometimes as one part of an Unfair Practices Act) and in the Robinson-Patman Act. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1940). (*Id.* § 3 forbids, *inter alia*, sale of goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor.") But all these other mechanisms are beyond the scope of this Comment.

4. See Boulding, *In Defense of Monopoly*, 59 Q.J.ECON. 524 (1945).

5. From a number of possible examples, public regulation of agricultural marketing, securities exchanges, utilities, commodities such as coal, oil, and milk, and terms and conditions of labor may be mentioned.

6. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940).

7. Cases run back to *The School Master Case*, Y.B. 11 Hen. IV 47, Pl. 21 (1410), in which cut rates for teaching instituted by newcomers were held no ground for a writ of trespass. And it was said in *Commonwealth v. Hunt*, 4 Metc. 111, 134 (Mass. 1842), that a baker injured by another's price reductions would similarly be denied relief; through such competition, "the best interests of trade . . . are promoted." Reselling, at prices below cost, goods purchased from the plaintiff was held no ground for action in *Ajello v. Worsley*, [1898] 1 Ch. 274. And Rogers, *Predatory Price Cutting as Unfair Trade*, 27 HARV. L. REV. 139, 157 (1913) recognized that common law "relief against injurious price cutting would

petition, based on tort conceptions, has dealt only with the limited instance in which price cutting is maliciously directed against a particular competitor.⁸

be novel." For a full summary of the common law views, see *Kent Stores v. Wilentz*, 14 F. Supp. 1, 6-8 (D.N.J. 1936), and cases collected in Notes, 47 YALE L.J. 1201, 1206 (1938); 52 HARV. L. REV. 1142, 1146-7 (1939); 1941 WIS. L. REV. 425, 430; 15 MISS. L. J. 213-216 (1943).

8. The classic *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909) held good against demurrer a complaint alleging that a wealthy banker, failing to secure plaintiff barber as tenant, had opened a nearby barbershop and was maliciously driving plaintiff out of business by methods of which selling below cost was one. *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1911), followed *Tuttle v. Buck* in holding Standard liable for undertaking retail competition with the "malicious purpose" of driving plaintiff out of business. Contrast the earlier *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 105 Fed. 163 (C.C.A. 8th 1900), *cert. denied*, 181 U.S. 617 (1901), (allegedly willful and malicious attempts to put plaintiff out of business or injure him by offering his products at unprofitable prices held lawful). And see 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 358-61 (1906).

Engaging in business for the purpose of eliminating another is described as unlawful, but the use of predatory price cutting, though "harsh," is considered *damnum absque injuria* by the RESTATEMENT, TORTS, §§ 708-9 (1938). *But cf.* *Master Barbers' Ass'n v. Baiata* (Ill. Super. Ct. 1935, cited in Fathchild, *Statutory Unfair Competition*, 1 Mo. L. REV. 20, 25 (1936)) (price cutting, engaged in without malice and by one who had not engaged in business to eliminate competitors, enjoined as unfair competition at common law; injunction sustained without opinion in appeal from contempt order, 304 Ill. App. 252, 26 N.E.2d 187 (1940)). Probably most courts dealing with price cutting would not go so far as the *Master Barbers'* case in extending the doctrine of unfair competition. See statements in *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938) (Unfair Practices Act held to prohibit sales below cost in which both malice and a desire to gain were present—sales, therefore, "which at common law would be entirely innocent" because not wholly inspired by malice); *Potter Press v. C. W. Potter, Inc.*, 303 Mass. 485, 494, 22 N.E.2d 68, 73 (1939) (price cutting to levels below cost declared to be a "lawful form of competition" prior to advent of the Unfair Sales Act); *Katz v. Kapper*, 7 Cal. App.2d 1, 44 P.2d 1060 (1935) (sales below cost to capture competitor's customers, though "ruthless, or unfair, in a moral sense," were not illegal). And see *Remington-Rand v. Master-Craft*, 67 F.2d 218, 221 (C.C.A.6th 1933) (price cutting held lawful because not "an element in a scheme to trade unfairly," but a mere result of "ordinary rivalry in business.")

Viewing unfair competition as a branch of tort law has involved the doctrinal attempt to explain what conduct is unlawful by employing the "omnibus doctrine" of justification. Green, *The Torts Restatement*, 29 ILL. L. REV. 582, 584 (1935). All competitive activity causes some injury; but, in this view, most of it is "justified" because, as Holmes put it, the law adopts "the economic postulation that free competition is worth more to society than it costs." (*Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894)). Thus it has been declared that "if . . . trade is invaded in the course of fair competition there is a recognized justification; while there is no valid excuse in the case of unfair competition." WYMAN, CONTROL OF THE MARKET 27 (1911). And see 1 CALLMAN, *op. cit. supra*, note 3, §§ 5-6 (1945) for the proposition that the law distinguishes between conduct which is "aggressive" and that which is merely "competitive." See further, Callman, *What is Unfair Competition?*, 28 GEO. L.J. 585 (1940). The language of "justification," of course, is not at all helpful in determining what is, or ought to be, considered unjustified (see Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1302-4 (1940); *Huskie v. Griffin*, 75 N.H. 345, 74 Atl. 595 (1909)), and the suggested category of "aggressive" conduct, (said to be appropriate only to areas of legitimized struggle, such as the boxing ring) seems no more promising. In fact, except in the rare case

Actions by the Federal Trade Commission⁹ and suits under state and federal anti-trust laws¹⁰ have demonstrated that price cutting can be unlawful, but the direction of these cases has been toward reaching only those examples of price reductions which form part of a scheme of market domination, *i.e.* in which low prices are intended to drive others from the market and pave the way for monopoly. Such attacks on low prices ignore the incidental injury caused to other sellers when one competitor cuts prices in response to normal market pressures.

Faced with this situation, therefore, competitors seeking to limit the play of free market prices have turned to such schemes as cost protection, the influence of which has extended to notions of business ethics, to trade association activities and the FTC's Trade Practice Conferences, to the NRA, and, in the current phase, to the present state legislation. Under this theory, every fair-dealing enterprise is entitled, and even obliged, to sell its product at a price which adequately covers all its costs; any lower price is branded as an unfair, "chiseling" attack on other sellers¹¹ or as a vicious attempt to fool the public.¹² For the theory to operate successfully, there must be

of actual malice such as *Tuttle v. Buck*,—what Holmes called "disinterested malevolence," *American Bank & Trust Co. v. Fed. Reserve Bank of Atlanta*, 256 U.S. 350 (1921)—the whole tort concept seems inapplicable to the particular injuries caused by competitive price reductions, which a free enterprise system assumes will be inflicted, wherever possible, in the interest of lower prices. It seems more practical to define what price cutting is unlawful and "predatory" by relation to the effect of any given conduct on the market in which it is used. Such an approach would afford relief to injured competitors when price cutting, whether directed at them or not, injures the free market by a sufficiently dangerous tendency to restrain trade or create a monopoly. This treatment attaches much more importance than have the cases, at least in their reasoning, to *who* the price-cutter is, and what threat his activity carries to the continued existence of competitive prices. See notes 27, 30 *infra*.

Compare with the above approaches an attempt in *Moon v. Clark*, 192 Ga. 47, 14 S.E.2d 481 (1941) to deal with the problem of sale below cost (no statute involved) in terms of public nuisance.

9. See note 28 *infra*.

10. See note 27 *infra*.

11. The force and effect of this theory, even without statutory encouragement, is indicated in *Meyerson v. Hurlbut*, 98 F.2d 232, 233 (App. D.C. 1938), in which it was held slander *per se* for defendant to have said: "Meyerson has been cutting prices . . . [he sold] below cost, just to hold the business. . . ." The court noticed "the familiar fact that the practice of selling goods below cost has come in recent years to be widely and sharply condemned as harmful."

12. It is on this ground that "loss leaders" have usually been attacked. The leader, featuring some low price to attract the customers' attention, was called by Brandeis a "mis-leader, because ordinarily the very purpose of the cut-price is to create a false impression [of general economies]. . . ." Brandeis, *Preventing Standardized Prices*, quoted in WEIGEL, *THE FAIR TRADE ACTS*, 82 (1938). Brandeis feared the use of such devices would eliminate the small entrepreneur. *BRANDEIS, BUSINESS—A PROFESSION* (1914). And see SELIGMAN AND LOVE, *PRICE CUTTING AND PRICE MAINTENANCE* 143-62 (1932), emphasizing the effect of interdependent prices on leader selling. Actually, however, both the extent of the use of

agreement on what constitutes "cost."¹³ "Accounting principles" do not answer this problem;¹⁴ accountants themselves differ widely¹⁵ as to proper

loss leaders and the harm which they cause have received little careful inquiry, and remain largely speculative. The term itself amounts to little more than an epithet, Nelson, *Trade Practice Conference Rules and the Consumer*, 8 GEO. WASH. L. REV. 452, 460 (1940); frequently it refers not to sales below invoice cost but to sales below what is considered a proper mark-up. ZORN AND FELDMAN, *BUSINESS UNDER THE NEW PRICE LAWS* 263-74 (1937). And see note 26 *infra*.

13. See PATON, *ESSENTIALS OF ACCOUNTING* 78-9 (1938); VAN SICKLE, *COST ACCOUNTING* 5 (1938) ("there is no such thing as an *exact* cost"). Tannenbaum, *Cost Under the Unfair Practices Acts*, 9 *STUDIES IN BUS. ADM'N* in 12 J. BUS. U. OF CHI. No. 2 at 16 (1939) states that to speak of the cost of a product with certainty is an impossibility. "The purpose in hand determines . . . [its] nature . . ."

Addressing the National Association of Cost Accountants in early NRA days, Mr. Nelson Gaskill called for "uniformity of method and of understanding among cost accountants," to eliminate "disparity in cost and price arising out of methods of accounting" used by different industries, or different firms within an industry. NATIONAL ASSOCIATION OF COST ACCOUNTANTS, *YEAR BOOK* 174 (1933). The problem still exists. See Hertzler, *What Costs for Price Control?*, N.A.C.A. *YEAR BOOK* 97, 102 (1945).

14. "[I]t . . . [is] possible to have several different costs . . . [estimated] in accordance with accepted cost accounting theory and practice. . . ." VAN SICKLE, *op. cit. supra* note 13. And see Wienshienk, *Accountants and the Law*, 96 U. OF PA. L. REV. 48 (1947).

15. Professor Paton, in viewing sales below cost prohibitions as "artificial price-fixing in terms of . . . artificial cost calculations," has stated that reconciliation of "the various concepts of cost and methods of measuring costs . . . looks like a hopeless task." *Costs and Profits in Present-Day Accounting*, 16 N.A.C.A. BULLETIN 123, 139 (1934). Other accounting authorities have been equally perplexed; the following exchange occurred at the Association of Cost Accountants' June, 1933, meeting:

Chairman Marsh: It seems . . . we are . . . confused a little in connection with pricing. . . . The requirement is that you shall not be permitted to sell below costs.

Dr. Reitell: I am afraid you do not see the picture.

Chairman Marsh: *Don't ask me what cost is.*

Dr. Reitell: I should like to see [costs] discussed for an industry, if you please.

N.A.C.A. *YEAR BOOK* 84 (1933). (Emphasis added.)

To many businessmen, however, "a cost system is not a high-sounding bit of chicane; it is an honest portrayal of what they conceive to be their 'true' costs." HAMILTON AND TILL, *THE COST FORMULA FOR PRICE* 37 (Report 9, NRA Committee on Price Policy, 1935). And in *People v. Kahn*, 19 Cal. App.2d 758, 765, 60 P.2d 596, 599 (1936), a case arising under California's Unfair Practices Act, the court declared the problem was "a factual one, that of discovering the cost, as a truth." When another California court later protested that no standard was provided in the sales-below-cost prohibition for determining depreciation, measuring values, or limiting the types of expenses to which "cost" referred, *Balzer v. Caler*, 74 P.2d 839 (Cal. App. 1937), the appellate court overlooked the problem 11 Cal.2d 663, 82 P.2d 19 (1938) and the writer of a Note, 47 YALE L. J. 1201, 1204 (1938) suggested that the "meaning [of cost] is articulated in reasonably objective systems of cost accounting." In *State v. Langley*, 53 Wyo. 332, 365, 84 P.2d 767, 779 (1938), the court held a "reasonable interpretation" of cost in the Unfair Competition Act was "what business men generally mean [by cost] . . . arrived at by a reasonable rule."

Basically, the questions presented by sales-below-cost prohibitions involve (a) whose cost—that of the individual producer, a theoretical or observed marginal producer, or an average somehow derived? and (b) what costs—*i.e.*, given the unit or average under (a), what elements should be included in the calculation, and on what assumptions? See Camman, *Costs in the Determination of Selling Prices*, 66 J. ACCOUNTANCY 7, 12-6 (1938).

methods of valuing assets,¹⁶ of assigning general expenses to particular products and periods,¹⁷ and of computing other elements of cost. Uniform accounting procedures and prima facie presumptions of cost have, therefore, formed a vital part of cost protection schemes, both to establish a common definition of cost among competitors and, in practice, to fix these costs at a level which will insure sufficiently high prices.¹⁸

THE COST PROTECTION PRINCIPLE: ECONOMIC FACT OR FALLACY?

The beguilingly simple proposition that prices should provide for the producer's cost may seem sound upon its face; given the equilibrium assump-

16. Although the lower of cost or market value is considered the usual method of valuing current assets, GRAHAM AND KATZ, *ACCOUNTING IN LAW PRACTICE* 198, 204 (1938), there is much divergence of view, based on the desire to reflect a realistic current value. May, *The Future of the Balance Sheet*, 84 J. ACCOUNTANCY 98 (1947); PATON, *ADVANCED ACCOUNTING*, 138-60 (1941); and see note 57(a) *infra*. And where inventory cannot be traced piece by piece, varying methods of determining what charges shall be made to inventory for the stocks sold, such as "last-in, first-out," "first-in, first-out," or weighted average, produce differing reports of "cost" for the period. Paton, *op. cit. supra*. As to fixed assets, although the balance sheet and depreciation rates are generally based on original cost (GRAHAM AND KATZ, *op. cit. supra* at 224), the same demand exists for showing (and depreciating) a replacement value which is generally higher than original cost. But the inclusion of such depreciation rates as an expense, in order to replace the asset at current prices (as regulated utilities were generally allowed to do), causes an overstatement of costs. See Kripke, *Accountants' Financial Statements and Fact-Finding in the Law of Corporate Regulation*, 50 YALE L.J. 1180, 1195-6 (1941).

17. Often such assignment of "costs" is wholly arbitrary, as where a seasonal enterprise sells some goods in the off-season, where scrap or waste of some value is produced in operations, or where one product, such as cotton-seed, is necessarily produced by processing the principal product, cotton. See Fox, *Joint-Product Costs*, 15 N.A.C.A. BULL. 915-35 (1934).

18. Uniform procedures have the magical effect of freezing into fixed elements of cost, which all competitors will proceed to collect in the market, such expenses as advertising, distribution, or an owner's salary—items which would normally vary with the fortunes of the enterprise, and which are not rightfully part of the "cost" of the product. Hamilton, *Cost as a Standard of Price*, 4 LAW & CONTEMP. PROB. 321, 331-2 (1937). As to whether "cost" should include expenses of advertising and distribution, compare Weld, *Why Marketing Cost Should Be Part of Production Costs*, 165 PRINTERS' INK 63 (Oct. 19, 1933) with Falk, *Marketing Cost Does Not Belong in Minimum Prices*, 165 PRINTERS' INK 63 (Oct. 12, 1933). A recent writer concludes, "All costs are important in [fixing] . . . selling prices. . . . A cost system which covers merely production costs is only half a cost system." Greer, *Cost Requirements of a Competitive Economy*, N.A.C.A. YEAR BOOK 101, 117 (1944).

Fully developed uniform accounting systems directed toward price "stabilization" have included not only distribution costs, but interest charges on funds borrowed or invested in the enterprise, depreciation on fully depreciated but productive facilities (not infrequently at a replacement cost value), and even state and federal income tax payments. PEARCE, *TRADE ASSOCIATION SURVEY*, 260-78 (TNEC Monograph 18, 1941). For an unconscious declaration of the value of uniform accounting in stabilizing prices, see Halligan, *The Relation of Uniform Cost Accounting to Competition*, 139 ANNALS 74, 77 (1928) (" . . . a company may actually believe its low quotation . . . warranted by low cost when, if . . . uniform accounting . . . [is] followed, . . . a loss may be the result . . ."—so the 'low quotation' would be raised).

tions of supply and demand economics, prices over the long run should indeed tend to allow for the total costs of all producers, and for competitive profits as well.¹⁹ But this equilibrium exists only in the long run, when all resources are properly allocated in accordance with productivity. It is not intended to be a norm for day-to-day price policy. In the short run, the way in which resources are in fact to be guided by the market to their most economic uses is precisely by prices which are either *above* costs (thus attracting more resources to the short areas), or *below* costs (thus tending to drive resources out of the less economic areas). Prices in the short run are thus governed primarily by demand factors—consumers' choices among alternative ways of spending their money. Independent producers adjust to such market prices as best they may in the light of their internal cost conditions, carrying forward production so long as marginal revenue exceeds marginal cost. The idea of freezing prices at the level of cost prevents the market from performing its chief social function—guiding the allocation of resources according to criteria of productivity and consumer demand.²⁰

The principle is likewise indefensible where imperfect competition prevails.²¹ Under such conditions—which many economists have contended are the more typical²²—productive facilities are allowed to remain idle if greater profits are thereby attainable. Nevertheless, except for the situations of monopoly or oligopoly, there is a continuing pressure from individual producers, which increases with their number and their lesser significance in the market, to make use of this idle capacity by making a price appeal and obtaining greater volume. The producing group can meet these pressures and maintain a non-competitive price only if some method can be found to keep wayward price-cutters in line behind a common price front.²³ An effective cost protection scheme can provide this restraint by

19. HENDERSON, *SUPPLY AND DEMAND* 54 (1922); FRASER, *ECONOMIC THOUGHT AND LANGUAGE* 107 (1937); HICKS AND HART, *THE SOCIAL FRAMEWORK OF THE AMERICAN ECONOMY* (1945) *passim*. For one of the early attempts to justify cost protection on a theoretical basis, see EDDY, *THE NEW COMPETITION*, 256-8 (4th ed. 1915).

20. In this sense, the "cost-of-production basis for fixing prices . . . is based on an antiquated theory of value [and] . . . is theoretically untenable." Backman, *Cost of Production as a Basis of Price Fixing*, 66 J. ACCOUNTANCY 143, 153 (1938). For the best general statement, see Hamilton, *Cost as a Standard of Price*, 4 LAW & CONTEMP. PROB. 321 (1937). The "general application (of a cost-recovery theory of prices) as a cure-all for industrial ills" is described as "economic quackery" in HAMILTON AND TILL, *THE COST FORMULA FOR PRICE* 76 (Report 9, NRA Committee on Price Policy, 1935).

21. See MILLER, *UNFAIR COMPETITION* 359-96 (1941).

22. See among others: CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (5th ed., 1946); BURNS, *THE DECLINE OF COMPETITION* (1936); HAMILTON, *PRICE AND PRICE POLICIES* (1938) and *THE PATTERN OF COMPETITION* (1940); ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940); NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* (TNEC Monograph 1, 1941); AM. ECON. ASS'N, *READINGS IN THE SOCIAL CONTROL OF INDUSTRY* (1942).

23. WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY*, cc. II, V (TNEC Monograph 21, 1940). That groups of sellers can obtain greater net returns from prices

requiring that prices be based on a cost reflecting the less-than-capacity operation.²⁴ Since the fixed costs of maintaining unused capacity create higher unit costs for the units which are produced, such a scheme prices some purchasers out of the market and forces those who can afford the higher price to pay either for unproductive equipment or, in the distributive trades, for an excessive number of outlets. And such a restriction of consumer purchasing power may well have the additional effect of contributing to the severity of the business cycle.²⁵ To require prices which invariably insure a return for costs, therefore, is to foster the twin evils of high prices and low production.²⁶

above the competitive level is due to a relative inelasticity of many demand situations, in which, subject to the competition of other types of goods, revenues are not proportionately reduced by a rise in prices. See CHAMBERLIN, *op. cit. supra* note 22.

24. See NOURSE, PRICE MAKING IN A DEMOCRACY 372 *et. seq.* (1944); *How are Industrial Prices Developed?*, N.A.C.A. YEAR BOOK 8, 19 (1939). Dr. Nourse has emphasized and deplored the tendency, encouraged by uniform methods of cost calculation, to compute costs at assumed "standard" rates of production, far below capacity, even though actual production may be much higher. *Cost Finding and Price Determination*, N.A.C.A. YEAR BOOK 27 (1945). And see WILCOX, *op. cit. supra* note 23, at 273-4.

25. MEANS, INDUSTRIAL PRICES AND THEIR RELATIVE INFLEXIBILITY, SEN. DOC. NO. 13, 74th Cong., 1st Sess. (1935); Edwards, *The Relation of Price Policy to Fluctuations of Investment*, 28 AM. ECON. REV. SUPP. 56 (1938); HANSEN, FISCAL POLICY AND BUSINESS CYCLES (1941), and *Economic Progress and Declining Population Growth* in READINGS IN BUSINESS CYCLE THEORY 366, 380-1 (Am. Econ. Ass'n 1944); Simons, *Economic Stability and Antitrust Policy*, 11 U. OF CHI. L. REV. 338 (1944); and see Nourse, *op. cit. supra* note 24.

26. A common reason given to justify the cost protection idea is the necessity to curb "loss leaders." See note 12 *supra*, and assertion in Note, 14 TEMP. L.Q. 95, 111 (1939).

Though it was once contended that loss leaders in a single year (1929) accounted for three to five billion dollars in retail sales (BLOOMFIELD, TRENDS IN RETAIL DISTRIBUTION 329 (1930), one of the few studies of the problem found that in 1928 less than one-fifth of the stores surveyed used leaders to any degree. FTC, CHAIN STORES: CHAIN STORE LEADERS AND LOSS LEADERS, 20 (1932). There is some indication, moreover, that as the chains which were thought to employ loss leaders most widely have grown in size, (see HOFFMAN, LARGE SCALE ORGANIZATION IN THE FOOD INDUSTRIES, 71, 79-83, TNEC Monograph 35, 1940) they have abandoned their cut-rate emphasis and found it to their greater interest to support price stabilization. See MACK, CONTROLLING RETAILERS 72-3 (1936). As early as 1931, the president of the American Food Institute stated "Each chain knows that its quotations will be . . . met by . . . the other chains. This . . . has turned men's minds towards other methods. . . ." Address by Gordon C. Corbaly, BOSTON CONFERENCE ON RETAIL DISTRIBUTION 97 (1930). And see suggestions to this effect in Comment, 32 ILL. L. REV. 816, 847 (1938). The sales below cost recently found to have been practiced by certain retail divisions of the A. & P., in *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 639-42, 664, 678 (E.D. Ill. 1946) were not individual loss leader sales, but amounted to book losses by retail units which were directed to achieve larger volume, and these losses were held one element of an overall scheme to restrain trade in violation of the Sherman Act.

Loss leaders may, in fact, allow for desirable variation in otherwise rigid price structures. See LYON, THE ECONOMICS OF FREE DEALS 121 (1933). Their common prohibition in NRA codes was opposed by the NRA Trade Practice Committee, which felt additional proof of their actual effects should be shown. LYON, THE NATIONAL RECOVERY ADMINISTRATION 600-2, 733-4 (1935). Thus, it would seem of dubious wisdom to adopt cost-protection as a

Admittedly, there is a danger to competitive markets and to other sellers when sales below cost are employed by powerful units in order to destroy their competitors. But proceedings under state and federal anti-trust laws ²⁷

remedy for a condition whose evils have yet to be proved. The possible effect of the adoption of the scheme is shown by an FTC survey described in the REPORT ON RESALE PRICE MAINTENANCE 861-2 (1945), which found that retail leader prices in southern California prior to adoption of the state Unfair Practices Act were seldom if ever below invoice cost, but the effect of the Act was to increase prices of many items not previously employed as leaders.

27. *State actions:* Under the Nebraska anti-trust law a large interstate utility was enjoined from underselling, at rates below cost, a smaller local competitor. *State ex rel. Spillman v. Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427 (1929). And in *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936), evidence of sale of coal below cost by one whose tonnage volume was three times that of his largest competitor was held sufficient to allow the jury to infer an intent to destroy the business of his competitors, and later to raise the price and monopolize the market. *Mulliken v. Naph-Sol Refining Co.*, 302 Mich. 410, 412, 4 N.W.2d 707, 708 (1942) held unenforceable, as against the price-fixing prohibition of the state anti-trust law, a contract by which a supplier and a retailer of gasoline planned price reductions to "reestablish the price on a fair basis and drive the so-called cut-rate stations . . . out of business."

Treble damages have been recovered only in *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 172 La. 781, 135 So. 239 (1931), in which plaintiff was injured by the sale of ice at less than cost by defendant, a large scale operator found to be attempting to create a monopoly. But the anti-trust point of view appears to have influenced the extension of principles of unfair competition to prohibit price cutting in *Memphis Steam Laundry-Cleaners v. Lindsay*, 192 Miss. 224, 5 So.2d 227 (1941) although the anti-trust statute was not said to be involved. Defendant extended a large cleaning and pressing business into plaintiff's area and threatened him with the necessity of doubling his established prices or facing ruin. When plaintiff refused to raise his rates, his new competitor cut prices to one half the plaintiff's level, which was below defendant's "cost of doing work." Punitive damages were awarded.

Federal actions: In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931), sales of paper at low prices, sometimes below cost, were made by a combination of manufacturers allegedly attempting to force plaintiff out of the market. Although plaintiff's capital was not large and he succumbed, he showed he was an efficient producer who could under normal conditions have survived. The court upheld his right to recover treble damages in spite of the difficulty of their measurement, and declared the relation between defendant's sales below cost and plaintiff's inability to remain in business was properly one for the jury. This case was followed in *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972 (C.C.A.2d 1944), in which defendant manufacturers of milk bottle hoods and caps conspired to charge a combination price for both which, though not alleged to be below cost, was fixed so low as to drive plaintiff, a producer of hoods alone, out of business. The court held that the failure to allege sales below cost was not a sufficient distinction from the *Story Parchment* case, since the prices here fixed "had no reasonable economic foundation" apart from the purpose to eliminate plaintiff, and that a cause of action for treble damages had been stated. *Cf. Fleetway v. Public Service Interstate Transportation Co.*, 72 F.2d 761 (C.C.A. 3d 1934): plaintiff, operator of 9 buses, made reductions in fares below those charged by the established defendant company, operator of 400 buses. Defendant thereupon reduced fares further (though not to a point alleged to be below his cost) and plaintiff sought injunctive relief just before being forced out of business. The court, making no distinction between the two price reductions, denied the injunction since plaintiff "instigated [the] contest"; *United States v. Great Western Sugar Co.*, 39 F.2d 149 (D. Neb. 1929) (demurrer sustained to a complaint which alleged defendant cut prices in an area where a competitor planned to build new fac-

and actions by the Federal Trade Commission ²⁸ have shown that anti-trust statutes, if vigorously enough enforced, are fully capable of meeting this danger. The anti-trust approach, moreover, views the alleged predatory

tories, but which failed to allege this conduct was intended to exclude the new competitor, or was part of a conspiracy in violation of the Sherman Act). And see Stone, J., dissenting in *Boss Mfg. Co. v. Payne Glove Co.*, 71 F.2d 768, 771 (C.C.A. 8th 1934).

Earlier anti-trust cases in which sales below cost constituted an element of illegality did not stress market control as strongly as mere injury to competitors, following the *Oil and Tobacco* cases in which underselling and price discrimination were condemned as predatory practices. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). In *Thomsen v. Cayser*, 243 U.S. 66 (1917), the use of "fighting" ships to undercut shipping rates of competing lines, with resultant injury to them, was one element of an illegal combination. Sales below cost were also evidence of an intent to monopolize in *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916). And in *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); and *United States v. International Harvester Co.*, 274 U.S. 693 (1927), one of the factors supporting the findings that these "good" trusts had not violated the Sherman Act was that they had not sold below cost (Harvester) or made discriminatory price reductions (Steel). For the more recent emphasis on market effects, see generally Mason, *Monopoly in Law and Economics*, 47 YALE L. J. 34 (1937); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947).

28. The Commission has taken action against sales below cost, and lists such sales, when made "with the intent and effect of hindering or suppressing competition," as one of the "Typical Methods and Practices" which it condemns. See Method 24, FTC ANN. REP. 42 (1946). These actions are taken despite a limitation contained in *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307 (C.C.A. 7th 1919) which confined the scope of the Commission's authority to sales accompanied by misrepresentation (such as Sears' false claim that quantity purchases made possible its low price on sugar). The court found that in making "unfair methods of competition" unlawful in § 5 of the Federal Trade Commission Act, 38 STAT. 719 (1914), 15 U.S.C. § 45 (1940) "Congress [did not intend] . . . to restrain an owner of property from selling it at any price . . . acceptable to him . . ." (at 312). But the same court later asserted the Commission's ability to restrain price cutting when "used as an element in some fraudulent scheme of oppression." *Sinclair Refining Co. v. FTC*, 276 Fed. 686, 688 (C.C.A. 7th 1921), *aff'd*, 261 U.S. 463 (1923). And Handler, *Unfair Competition and the FTC*, 8 GEO. WASH. L. REV. 399, 422 (1940), expresses "little doubt of the Commission's authority to prohibit such (below-cost) sales as a part of a scheme to suppress competition."

Early actions involving sales below cost were inconclusive. *Dismissed for lack of proof or without assignment of reason*: *United Drug Co.*, 1 F.T.C. 539 (1919); *United States Food Products Corp.*, 3 F.T.C. 435 (1920); *International Ice Cream Co.*, 9 F.T.C. 466 (1925); *General Shale Products Corp.*, 14 F.T.C. 499 (1930). *Cease and desist orders issued*: *Ward Baking Co.*, 1 F.T.C. 388 (1919), *rev'd because no interstate commerce involved*, 264 Fed. 330 (C.C.A.2d 1920); *The Oakes Co.*, 3 F.T.C. 36 (1920) (espionage against competitors as well as sales below cost); *Waldes & Co.*, 8 F.T.C. 305 (1925) (some false representation as well as sales below cost); *Stipulation 392*, 13 F.T.C. 344 (1929) (price discrimination and sales below cost forbidden).

But beginning with *Noma Electric Corp.*, 15 F.T.C. 87 (1931) the Commission, though only in a limited number of actions, has restrained below-cost sales when used as an instrument of gaining market domination. See also note 65 *infra*. In the *Noma* case respondent, holding a "dominant position" in the Christmas tree lighting field, sold below cost to drive out competitors, and was held in violation of the Act. And see *Blackwell Journal Publishing Co.*, 23 F.T.C. 413 (1936): A newly established newspaper, formed to oppose the existing

sales in their full setting,²⁹ and avoids the blanket condemnation provided in cost protection schemes against *any* sales below cost, whether made by a potential monopolist or by a normal competitor.³⁰ The blanket prohibitions,

paper's editorial position with regard to public ownership of a utility, cut advertising rates to one-third of the prior level, and sustained losses of \$94,000 (original capital \$100,000). As a result, the older paper was forced to take losses of \$12,000 a year. *Lock Joint Pipe Co.*, 27 F.T.C. 709 (1938): Producers, controlling 75% of concrete pipe manufacturing in the Washington, D.C. area, formed a separate corporation to sell below cost and drive out competition. Collusive bidding through this corporation was a further element of illegality. *E. B. Muller & Co.*, 33 F.T.C. 24 (1941): Chicory marketers under unified control tried to eliminate their only substantial competitor by price discriminations which resulted in their selling substantially below cost, according to the Commission's analysis. Disparagement of the competitor was also involved. In sustaining the FTC's order on appeal, *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (C.C.A. 6th 1944), the court held the findings of the FTC's accountant as to losses sustained were not "clearly erroneous" and would therefore prevail over the company's objection that they rested on an arbitrary and unjustified distribution of cost made by the Commission's accountant. See note 15 *supra*.

As to the Commission's role in preserving competitive markets generally, see Montague, *The Commission's Jurisdiction over Practices in Restraint of Trade: A Large-Scale Method of Mass Enforcement of the Anti-Trust Laws*, 8 GEO. WASH. L. REV. 365 (1940), and WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE*, 52, 277 (3d ed., 1940).

29. See MILLER, *op. cit. supra* note 21, at 407-8. The necessity of viewing price practices in their context is well illustrated in *Cleaning & Dyeing Plant Owners Ass'n v. Sterling*, 285 Ill. App. 336, 2 N.E. 2d 149 (1936). The depression-born plaintiff association, comprising 97 of 105 plant owners in the Chicago area, controlled all prices except those of defendant non-members, who had failed to comply with plaintiff's demands that all cleaning prices be uniformly increased. After attempting persuasion by bombs, bullets, and a strike of defendants' employees (secretly organized by plaintiff association), the plaintiff obtained a lower court injunction against defendants' selling below "costs" specified in an order drawn up by a master. Plaintiff's bill alleged defendants were "a combination of cut-throat competitors . . . demoralizing the industry by selling below cost." *Id.* at 358, 2 N.E. 2d at 158. The decree was apparently based on violation of the anti-trust law and unfair competition. Reversed on appeal, since defendants had not sought a monopoly or the destruction of plaintiff's business, and their sales even if found below cost were not unlawful in themselves; "but, on the contrary, . . . plaintiffs . . . endeavored to create a monopoly. . . ." *Id.* at 360, 2 N.E. 2d at 159.

30. Because "at bottom genuine price competition runs rather counter to the business code," Nourse, *Cost Finding and Price Determination*, N.A.C.A. YEAR BOOK 27, 37 (1945) there is danger that business men will magnify individual injuries from price cutting and demand legal relief where no threat to competitive prices exists, ignoring the fact recognized in *Remington-Rand v. Master-Craft Corp.*, 67 F.2d 218, 220 (C.C.A. 6th 1933), that "ordinary rivalry in business" may involve such injuries. The anti-trust doctrines, which do not admit such "competitive evils" as a justification for price fixing or restraint of trade (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); cf. *Appalachian Coals v. United States*, 288 U.S. 344 (1933)) seem an adequate safeguard against anti-trust statutes being used to inhibit sales below cost indiscriminately.

By no means do all below-cost sellers seek to dominate the market and extort a monopoly profit at some later time. For example, when a new competitor enters the market his early sales, even though at prices similar to those of his competitors, may involve a loss until greater volume brings down his unit costs. The extent to which these losses may be capi-

in fact, when they depend for their enforcement on private action, are peculiarly vulnerable to control by the larger units whose interest in price stability is the greatest, thus assisting the very competitors against whom sales-below-cost prohibitions are often said to be directed.³¹

EARLY EFFORTS TO ESTABLISH THE PRINCIPLE

But although economic theory may cast doubts on the desirability of cost protection, no such doubts have troubled its proponents. The earliest efforts at its establishment were voluntary regulations, coupled with uniform accounting plans and cost exchange services, imposed by trade associations during the 1920's.³² Although such cost protection programs were held by the Supreme Court to violate the Sherman Act in the *Hardwood*³³ and *Linseed Oil*³⁴ cases, later decisions in the *Maple Flooring*³⁵ and *Cement*³⁶ cases greatly widened the scope of permitted activity.³⁷ Further cooperation was secured in the Trade Practice Conference Procedure which was initiated by the Federal Trade Commission in 1926 for the ostensible purpose of establishing industry-wide standards of fair competition.³⁸ Conferences con-

talized as deferred charges is always open to dispute; the seller in this position who attempts to undercut competing prices to gain business is particularly vulnerable to attack for selling below cost. The facts may, however, show an attempt to control the market even in this situation, as in *Blackwell Journal Publishing Co.*, 23 F.T.C. 413 (1936). And see NELSON AND KIEM, *op. cit. supra* note 22, at 93. The more usual price cutting case not involving anti-trust violation will, of course, be presented by the seller who breaks through the non-competitive administered price in an attempt to gain volume. See page 397 *supra*.

It must be recognized that anti-trust cases examining sales below cost have developed no definite concepts for calculating cost, and since no administrative hearing precedes anti-trust litigation, there is no weight to be given to the prosecution's cost calculation such as the FTC enjoyed in *E. B. Muller & Co.*, 33 F.T.C. 24 (1941). But the cases show that violations can arise even where price cutting is not below whatever the "costs" may have been, which suggests that determination of costs may not be vital to prosecutions seeking to prevent market domination. *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972 (C.C.A. 2d 1944); *Fleetway v. Public Service Interstate Transportation Co.*, 72 F.2d 761 (C.C.A. 3d 1934).

31. *E.g.*, CALLMAN, *op. cit. supra* note 3, at 438, asserts the state laws are "manifestly designed to . . . [prevent] the strong from destroying the weak by . . . price war."

32. MILLER, *op. cit. supra* note 21, at 284-9.

33. *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

34. *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923).

35. *Maple Flooring Mfrs' Ass'n v. United States*, 268 U.S. 563 (1925).

36. *Cement Mfrs' Protective Ass'n v. United States*, 268 U.S. 588 (1925).

37. The field of permitted activity was narrowed in *Sugar Institute v. United States*, 297 U.S. 553 (1936). In the *Maple Flooring* case, the trade association promulgated average "cost" figures to its members, as well as uniform shipment charges, which the court recognized "could be made the basis for fixing prices . . . [in violation of] the Sherman Act." *Id.* at 572. But the Government's contention that such illegal price fixing would be a necessary result of circulating these cost compilations was rejected, partly because it was supposed that costs were the proper basis for prices under "economic laws." *Id.* at 584. See Fly, *Observations on the Anti-Trust Laws, Economic Theory, and the Sugar Institute Decisions*, 45 YALE L.J. 1339, 1354, and 46 YALE L.J. 228 (1936).

38. The FTC Conference Division was established, and the Rules were first given

ducted with industry and trade association representatives resulted in agreements published by the Commission as Trade Practice Rules; in 140-odd sets of Rules released before 1932,³⁹ there was expressed what a sympathetic member of the Commission has described as "the humanitarian impulse" of business groups seeking "protection against . . . unsystematized competition."⁴⁰ A more realistic observer saw the "unremitting pressure of the trade associations" employing the conferences as "a device for controlling prices."⁴¹ Virtually unrestrained by the Commission,⁴² participants advanced their programs both by recommending uniform accounting procedures and by condemning, as unfair competition, all sales below cost.⁴³

One of the clearest examples of the efficacy of trade association techniques was the system utilized by the association of commercial printing concerns. A uniform "Cost System" prescribed standard procedures by which 5100-odd competitors were directed to calculate their costs in quoting prices and making reports to the association; a Standard Guide and Price List provided averaged data, based on cost reports of selected members, and suggested a 25% mark-up over costs in quoting prices. In an investigation of the association,⁴⁴ the FTC found widespread approval by the membership of the effect of this scheme on printing prices. As one local bulletin explained:

"The old cutthroat days have gone, . . . and in their stead are days of the standardization of prices based on accurate costs as found by cost systems. . . . Too frequently . . . printers . . . have resorted to 'guess-timating,' . . . driving the buyer . . . to shop . . . to get the lowest price. . . . [Now, competing]

Commission sanction, in 1926, though some conferences were held earlier. FTC ANN. REP. 47-50 (1926).

39. FTC ANN. REP. 253 (1932).

40. GASKILL, *THE REGULATION OF COMPETITION* 130-1 (1936).

41. Watkins, *Trade Associations*, 14 ENCYC. SOC. SCI. 670, 675 (1934). And see Kittelle and Mostow, *A Review of the Trade Practice Conferences of the FTC*, 8 GEO. WASH. L. REV. 427, 437-8 (1940); Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 304 (1937).

42. ROOS, *NRA ECONOMIC PLANNING* 14-16 (1937). It was only after the Department of Justice in 1931 threatened to take action because the Conferences were "transforming the Sherman law out of all recognition" (GASKILL, *op. cit. supra* note 40, at 120), that the Commission began to exercise some control over the Rules. See 1 LYON, WATKINS AND ABRAMSON, *GOVERNMENT AND ECONOMIC LIFE* 288 (Brookings Inst. 1939).

43. WATKINS, *PUBLIC REGULATION OF COMPETITIVE PRACTICES IN BUSINESS ENTERPRISE*, c. VII (3d ed. 1940); FTC, *TRADE PRACTICE CONFERENCES* (1933); TANNENBAUM, *op. cit. supra* note 13, at 11. Rules first promulgated for the Waxed Paper Industry, which forbade below-cost sales without qualification, and called for the adoption of cost systems, are given in Nelson, *Trade Practice Conference Rules and the Consumer*, 8 GEO. WASH. L. REV. 452, 455 (1940). And see Beer, *Competition and the Federal Constitution*, 7 NOTRE DAME LAW. 442, 462-5 (1932).

44. United Typothetae of America, 6 F.T.C. 345 (1923).

printers . . . quote about the same price. . . . This . . . relieves the printer . . . and it saves the buyer . . . time. . . ." ⁴⁵

The cease and desist order issued in this case ⁴⁶ reflected the more lenient views to be expressed by the Supreme Court in the *Maple Flooring* case; ⁴⁷ though the Commission forbade publication of the Price List, it took no action to enforce its equally important order against the use of averaged cost data as a basis for fixed prices, actually countenancing, in fact, that order's violation.⁴⁸ The association's plans for peace among the printers were thus left relatively intact, available to point the way to others.⁴⁹

45. *Id.* at 366, quoting from the Portland Typothetae, July 15, 1919. The Printer's Guide declared, "A manufacturer need have no fear of a competitor if both ascertain their cost in a uniform way." *Id.* at 375. Further indications of the nature and purpose of this system fill the record, which was based on extensive hearings across the country over a six-month period. *E.g.*, "When strong cooperation is backed up with cost-finding, [printers] have plenty of guts to charge prices, because they can get them." *Ibid.* ". . . prices are running more uniform, with larger profits . . . [E]very printer . . . [hopes for] . . . a non-competitive basis. . . ." *Id.* at 374; "The average increase in prices . . . is easily 20%." *Id.* at 373.

46. The order forbade (1) the use of a cost system so as to suggest uniform additions to cost, (2) the receipt and publication of average or standard production costs for use in quoting prices. *Id.* at 383.

47. See note 35 *supra*.

48. As explained to the Second Annual Conference on Uniform Cost Accounting sponsored by the U.S. Chamber of Commerce, in 1924, the United Typothetae had already abandoned the 25% mark-up and had come to rely primarily on dissemination of *averaged* production data for every printing process, to which plants in various areas added the local hourly labor costs in quoting prices. Address of E. T. Miller, Secretary of the Typothetae, in CONFERENCE PROCEEDINGS 34-8 (U.S. Chamber of Commerce 1924). "Why . . . go to all this trouble to find costs unless we can use them? . . . We collect records . . . and give our members something on which they can calculate prices. . . ." *Id.* at 38. This use of compilations from uniform cost data, presenting to producers the statistics on which they can base prices regardless of their own individual costs, is the "focal point" of cost accounting activities currently forwarded by one-half of the country's trade associations; uniform cost systems are "merely a beginning." PEARCE, *op. cit. supra* note 18, at 297, 258. In the printers' case, the FTC's clear prohibition against publishing this averaged data was alarming, "as that work was of vital importance [and] . . . to retire from the battle . . . would be giving up fifteen years of pioneer . . . work." Statement of Counsel for the Typothetae, CONFERENCE PROCEEDINGS, *supra*, at 40. Accordingly, a petition to review the Commission's order was filed. *United Typothetae v. FTC*, 2 CCH TRADE REG. SERV. ¶6380.63 (C.C.A. 7th 1923). But correspondence with the Commission and ". . . the most earnest and sympathetic cooperation . . . from Commissioner Gaskill [who appeared] exceedingly patient, broad-gauged . . ." revealed that only publication of the price list was prohibited and that in respect to the averaged production costs the order did not at all mean what it plainly said, although "the commission could not see its way to publish . . . [this] . . . final outcome . . ." CONFERENCE PROCEEDINGS, *supra*, at 41. (As to the views of Commissioner Gaskill, see notes 13, 40 *supra*).

49. The Typothetae's system, which at one time engaged more than thirty field accountants, was a model to others although, "[l]ike every work that is successful, there [was] criticism" such as the FTC leveled. CONFERENCE PROCEEDINGS, *supra* note 48, at 34. All Typothetae members were kept rigidly "in line on uniformity" of accounts and reports. *Id.*

Trade Practice Conference Rules and the programs of trade associations,⁴⁹ followed by the Swope Plan, proposing a gigantic national trade group which would have made cost systems universal,⁵¹ were all harbingers of the NRA codes, which gave to the cost protection theory its most vigorous expression. Intensified by depression, the drive to restrict price competition was given unlimited scope in the early NRA. In fixed minimum prices,⁵² in "cost finding systems" originally contained in three-quarters of the codes as a "cornerstone of the hopes of a large number of applicants,"⁵³ and in sales-below-cost prohibitions,⁵⁴ the Blue Eagle scowled on all varieties of price reductions.⁵⁵ But its unqualified support of these techniques was

at 59. And see Jacke, *Printing Cost Estimates for Price Setting*, 15 N.A.C.A. BULL. 325 (1933). There is now pending against the Typothetae an FTC action to restrain uniform price fixing, etc. Docket 4517, 2 CCH TRADE REG. SERV. ¶ 6380.63 (1942).

50. The U. S. Chamber of Commerce energetically promoted uniform accounting in all trades by means of conferences and publications. See pamphlets by U. S. CHAMBER OF COMMERCE: WHAT A COST SYSTEM SHOULD DO FOR YOU (1924); UNIFORM COST ACCOUNTING IN TRADE ASSOCIATIONS: THE COST COMMITTEE (1924), ORGANIZATION OF ACTIVITIES (1924), ACCEPTANCE AND INSTALLATION (1925). Arguments advanced for cost systems included assertions that inefficiencies were exposed and prices reduced; guarded references to an opposite effect on price policies of "price cutters" were also made. At the Second Annual Chicago Conference on Uniform Cost Accounting, the delegate from the Mill: Dealers' Association typically remarked with regard to installation of their cost system: "The splendid cooperation we have experienced from our member[s] . . . has been truly remarkable. . . ." CONFERENCE PROCEEDINGS 11 (U.S. Chamber of Commerce, 1924). The work of the Chamber was described in Halligan, *supra* note 18, at 74, as "one of the greatest forces that has brought the benefits of uniform cost accounting to . . . various industries." The Chamber's recent advocacy of these benefits has been more carefully stated. See BLAISDELL, ECONOMIC POWER & POLITICAL PRESSURES 31 (TNEC Monograph 26, 1941).

51. Address by Gerard Swope, 65 Automotive Industries 476-9 (1931). Employers of 50 or more were to adopt "standard accounting and cost systems" based on a "uniform plan . . . adopted by the industry trade association." Business Week approved the plan, noting that ". . . [in] these times . . . the consumers' interest in low prices is an obvious illusion. . . ." Editorial, Business Week, Sept. 30, 1931, p. 44. See also Senator Nye's proposals to amend the Federal Trade Commission Act and to outlaw sales below cost. MILLER, UNFAIR COMPETITION, 296-8 (1941).

52. Minimum prices were set specifically in the early codes. Taggart, *Minimum Prices Under the N.R.A.*, 7 U. OF MICH. BUS. STUDIES No. 3 (1936). And see OPPENHEIM, CASES ON TRADE REGULATION 1232-4 (1936).

53. LYON, *et al.*, THE NATIONAL RECOVERY ADMINISTRATION 224 (Brookings Inst., 1935).

54. Such prohibitions were contained in a majority of the codes. *Id.* at 580-6. And see PEARCE, *op. cit. supra* note 18, at 296.

55. LYON, *op. cit. supra* note 53, at 620-2. The "model code," prepared in NRA's early days by the National Industrial Conference Board forbade selling below cost and defined cost as the average of costs reported to the several trade associations. NICB Memo, *Formulation of Codes of Fair Competition*, June, 1933, quoted in MACK, CONTROLLING RETAILERS 148-9 (1936).

In the 1933 NRA price hearings, it was stated: "The NRA has been a God-send and, to my mind, the finest thing . . . ever created for the benefit of industry. Who are . . . these poor . . . consumers we hear so much about . . . after all, but the servants and employees of industry?" Statement of Frank A. Bond, member of Chain Mfg. Industry Code Authority, quoted in HAMILTON AND TILL, *op. cit. supra* note 20, at 34.

short-lived, for the Recovery Administration soon realized it had the price-fixing bear by the tail.⁵⁶ Both in defining the uniform accounting systems it would approve,⁵⁷ and in qualifying its endorsement of sales-below-cost prohibitions,⁵⁸ the NRA executed a significant and almost complete reversal

56. LYON, *op. cit. supra* note 53, at 224. The Consumers' Advisory Board of NRA had opposed price fixing in various forms from the beginning, with some few exceptions. OPPENHEIM, *op. cit. supra* note 52, at 1236. And see ROOS, *op. cit. supra* note 42, at 257-9, 559-60.

57. Of the more than 400 industries whose codes prohibited sales below cost, half presented for NRA approval their systems of uniform cost accounting, which contained in almost all cases arbitrary provisions tending toward higher cost bases for prices. PEARCE, *op. cit. supra* note 18, at 296. Most of the proposed systems were therefore rejected: in addition to the 23 cost systems already in use at the time NRA began, only 39 others were accepted for code purposes, but many of these provided for *all* elements of direct and indirect costs. LYON, *op. cit. supra* note 53, at 586-9.

As NRA policy clarified on the use of such systems for price fixing, it made several changes:

(a) it announced (in July, 1934) that it would approve only systems which carried inventory values at "cost or market, whichever is lower," to prevent what the Administration called "artificial mandatory profits to those who accumulated inventories at low prices." *Cost Accounting and the NRA*, Am. Institute of Accountants Bull., Aug. 15, 1934. This pronouncement struck down the cost protection attempt to force sellers to base their prices on what were called "standard costs" *i.e.*, prevailing market costs, and to ignore any advantageous purchases which would allow them to sell for less. Passing on any advantage in lower prices had been described by this view as "not . . . correct from the standpoint of cost calculation . . ."; it would "glut the market" and destroy all competing sellers. Churchill, *Materials in Standard Costs*, 8 N.A.C.A. BULL. 984, 986 (1927).

(b) it disapproved the inclusion of interest and a return on invested capital as part of the inflexible "costs" of an enterprise. *Cost Accounting and the NRA, supra*.

(c) NRA disallowed depreciation of already depreciated assets, depreciation at replacement rather than cost values, or depreciation charges based on a current low volume of sales if "normal" volume was higher. Boyd, *Uniform Cost Accounting Systems Under the NRA*, 14 CERTIFIED PUBLIC ACCOUNTANT 671 (1934), and Boyd, *NRA and Destructive Price Cutting*, 15 CERTIFIED PUBLIC ACCOUNTANT 69 (1935).

58. The costs below which sales were prohibited frequently were average costs, Backman, *supra* note 20, at 146, and these were often gathered, in the absence of adequate or comparable cost data, from scanty and unreliable sources. Taggart, *supra* note 52, at 230. The NRA made belated attempts to overthrow these averages, and to substitute the individual's own costs as the standard, Boyd, *Uniform Cost Accounting Systems Under the NRA, supra* note 57. NRA Office Memorandum No. 228, June 7, 1934, though it encouraged "proper cost finding and accounting provisions in codes," sought to allow the individual to compute his *own* costs and to impose a uniform system upon him only "to the extent found practicable," thus avoiding "uniform items of cost . . . designed to bring about . . . uniformity . . . of prices." Cf. the strict uniformity imposed on printers by the Typothetae, *supra* note 49. Memorandum No. 228 further indicated a retreat from outright prohibitions on below-cost selling by providing only that "*consideration* should be given to costs in the determination of [prices] . . ." (italics added); what was forbidden was "destructive price cutting," as to which individual rulings would be made in response to complaints. In 1935, Nat. Industrial Recovery Board Release on Administrative Policy, No. 3, N.S. May 21, 1935, quoted in OPPENHEIM, *op. cit. supra* note 52, at 1234 laid a groundwork for abandoning the entire scheme of below-cost prohibitions. Pointing out that "business enterprise does not assure cost recovery" but "gives an opportunity to . . . profit and [a] . . . threat of loss," it asserted that "price is sometimes above and sometimes below the cost of production."

of its original policy.⁵⁹ Although the full development of this change was cut short by the *Schechter*⁶⁰ decision, it seems clear that the evils of cost protection were apparent even to an agency whose devotion to the philosophy of the Sherman Act was somewhat questionable.⁶¹

With the collapse of the NRA, trade groups which turned again to the Trade Practice Conferences⁶² found that they, too, were informed by a different spirit. No uniform accounting procedures were encouraged,⁶³ and a radical change was made in the type of sales-below-cost prohibition which the Trade Commission would approve. The rule approved in 1939 for the wine industry,⁶⁴ for example, applied only to sales made by a dominant member of the industry in order to restrain trade or monopolize, and referred only to the seller's own costs, and not to any average or cost-survey figure.⁶⁵ Indeed, all recent activities of the Trade Commission show an awareness of the effectiveness and danger of the generalized sales-below-cost prohibition as a price-fixing instrument.⁶⁶

Several retail trade groups, however, which had enjoyed in the NRA

It attributed to the depression emergency the "prominence [of] . . . a cost recovery theory of price."

59. The setting of outright minimum prices, see note 52 *supra*, was curtailed by NRA Office Memorandum No. 228, *supra* note 58, which permitted establishing such minima only temporarily for a declared "emergency."

60. *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

61. Professor Himmelblau, a member of the Committee on Accounting Procedure of The American Institute of Accountants, has stated: "One of the fundamental ideas in the whole NRA program was that all prices should be set in terms of cost. The NRA . . . was worth much of what it cost if it accomplished nothing more than to reveal the fallacy of this theory." *Advanced Cost Accounting Materials*, Northwestern University, 1936.

62. Kittelle and Mostow, *supra* note 41, at 433.

63. Among the rules collected in FTC, *TRADE PRACTICE RULES* (1940), none provides a uniform accounting system for an industry; those which refer to accounting state only that "each member should independently keep proper . . . records for determining his costs." *Id.* at 24. The Commission was led to this more cautious policy by a realization that former rules, requiring cost calculations to include "all elements recognized by good accounting practice," (*id.* at 2) might be used "as a club to intimidate concerns which reduced prices legitimately." Nelson, *supra* note 43, at 455. And see MILLER, *op. cit. supra* note 51, at 275; FTC, *TRADE PRACTICE RULES* (1946).

64. FTC, *TRADE PRACTICE RULES* 232 (1940).

65. "Sales below cost by a competitor not in a sufficiently strong competitive position to produce, and not actually producing, the monopolistic or restraining effect mentioned, do not fall within the inhibitions of this rule." *Ibid.* This type of prohibition thus substitutes the test of adverse effect on the market, rather than mere adverse effect on some individual competitors, as the standard for defining sales below cost as predatory. See also similar provisions in Rules for the Wholesale Confectionery Industry, Rule 17 (*but cf.* rule 10), 3 CCH *TRADE REG. SERV.* ¶ 20,252; Vertical Turbine Pump Industry, Rule 12, *id.* at ¶ 20,255; Doll and Stuffed Toy Industry, Rule 6, *id.* at ¶ 20,256. And see Nelson, *supra* note 43, at 454-56.

66. See FTC, *REPORT ON RESALE PRICE MAINTENANCE* (1945); Wholesale Liquor Distributors' Ass'n of No. Calif., 31 F.T.C. 1453 (1940); Western Confectioners Ass'n, 34 F.T.C. 1431 (1942), discussed at pp. 418-9 *infra*.

Retail Code⁶⁷ "just enough of a taste of long-forbidden fruits to whet their appetites,"⁶⁸ were not disposed to surrender the sanctions which the Code had provided against price reductions, whether made by large enterprises or small.⁶⁹ Combined in the Food and Grocery Conference,⁷⁰ trade associations in the grocery field secured the adoption during the late thirties of many of the state Unfair Practices Acts forbidding sales below cost.⁷¹ The other statutes, similarly framed in the traditional lingo of measures seeking to preserve free competition,⁷² were enacted during the same period. In con-

67. NRA Code of Fair Competition for the Retail Trade, approved Oct. 21, 1933, reprinted in MACK, *op. cit. supra* note 55, at 521. As originally drafted, this Code rewarded the "hopes and desires of a century held by fair-minded merchants, trade associations, and Chambers of Commerce," by requiring a uniform ten-percent markup over invoice cost for all sales. NRA Press Release No. 858, Sept. 21, 1933, quoting statement of Nat. Ass'n of Better Business Bureaus. As recounted generally in MACK, *op. cit. supra* note 55, this provision was held out of the Code by the efforts of Macy's and the Consumer's Advisory Board, but the requirement (in art. VII, sec. 1) that prices allow for "actual wages of store labor" amounted to the same thing, for the code authority fixed this allowance at ten-percent for the entire retail trade. This code did not include food products, the percentage markup for which was set in the Food and Grocery Code at six percent. ZORN AND FELDMAN, *op. cit. supra* note 12, at 318-9.

68. GREYER, *op. cit. supra* note 3, at 10.

69. The end of NRA saw many trade associations and their rules of conduct collapse, in very many cases because the association could not continue to stabilize prices through its own efforts. PEARCE, *op. cit. supra* note 18, at 372. Spokesmen, who complained more often against price cutting by small enterprises than by larger ones, typically stated: ". . . the chiseling 10 percent who operate in every business will not abide by any rules unless enforced by State or National laws." *Id.* at 18.

70. The Food and Grocery Conference Commission represented: Nat'l Retail Grocers' Assoc.; Assoc. Grocery Mfrs. of America; Nat'l Chain Store Assoc.; Nat'l American Wholesale Assoc.; Nat'l Retail Owned Wholesale Grocers; Nat'l Voluntary Groups Institute. Comment, 32 ILL. L. REV. 816, 846 n.184 (1938).

71. The model bill prepared by the Conference Commission was of the minimum mark-up type, *Ibid.*, and see note 90 *infra*; and the percentage mark-ups were those more suited to the retail food trade than to others. ZORN AND FELDMAN, *op. cit. supra* note 12, at 323-4; Tannenbaum, *supra* note 13, at 42. The food trades supported these Acts because resale price maintenance is for various reasons inapplicable in food retailing, where it has been attempted only in Ohio. See note 3 *supra*; FTC, REPORT ON RESALE PRICE MAINTENANCE 274-333 (1945); GREYER, *op. cit. supra* note 3, at 13. Gasoline, cigarette, and confectionery distributors have also made use of or sponsored the legislation. Thus in Ohio, after the manner in which resale price maintenance was used to stabilize cigarette prices had been held unlawful in *Rayes v. Lane Drug Co.*, 138 Ohio St. 401, 35 N.E. 2d 447 (1941), the Unfair Cigarette Sales Act was enacted, fixing the mark-ups for wholesalers and retailers. OHIO GEN. CODE § 6402-10 (Page, Supp. 1945).

It is to be noted that the retail food trade which the statutes largely affect is relatively unorganized, less than one-eighth of the nation's grocers being members of the Nat'l Assoc. of Retail Grocers. (FTC REPORT, *supra*, at 257-8.) Whether the statutes, which have been declared to have the purpose of "shielding the little fellow from his giant rival" (1 CALLMAN, *op. cit. supra* note 3, at 424) were secured through the efforts of the "little fellow" or by his "giant rival" is therefore a very real question.

72. Thus the California Act states its purpose "to safeguard the public against the creation . . . of monopolies and to foster and encourage competition. . . ." CAL. BUS. & PROF. CODE § 17001 (1944).

trast to earlier state legislation of the 1900's, as a part of which eight states⁷³ had forbidden sales below cost when made with an intent to destroy competition,⁷⁴ the acts of the post-NRA 1930's were not inspired by a renewed enthusiasm for anti-trust programs, but were designed to codify the principle of cost protection.⁷⁵

THE STATE STATUTES: PROVISIONS, CONSTRUCTION, AND ENFORCEMENT

The thirty-one statutes⁷⁶ forbid, in all but a few cases, the sale of any type of merchandise at less than the seller's cost, though their principal application has been in the tobacco products, confectionery, and grocery fields. In several cases they have met defeat in the courts on constitutional grounds,⁷⁷ but in twenty-eight states, either amended or as yet untested,

73. Ark., Idaho, Miss., Neb., N. C., S. C., Tenn., Texas. The South Carolina statute, S. C. CODE § 6626 (1942) is considered as part of this anti-trust legislation; *cf.* HANDLER, *op. cit. supra* note 3, at 1089 n.20.

74. See GREYER *op. cit. supra* note 3, at 36-7. A similar Kentucky statute, which declared it a crime for a combination to set a price above or below "real value," was held unconstitutional in *Internat'l Harvester v. Kentucky*, 234 U.S. 216 (1914).

75. See McAllister, *Price Control by Law in the United States: A Survey*, 4 LAW AND CONTEMP. PROB. 273, 298 (1937): "The cost protection principle of (the Unfair Practices Acts) is but the provision of the N.R.A. Retail Trade Code in a new dress and it is directly traceable to it."

76. ARIZ. CODE ANN. § 74-301 (1939); ARK. STAT. § 14313 (Pope, 1937); CAL. BUS. & PROF. CODE § 17043 (Deering, 1944); COLO. STAT. ANN., c. 48, § 302(1) (Supp. 1946); CONN. GEN. STAT., c. 138b, § 922 (Supp. 1939); IDAHO CODE ANN. § 47-201 (Supp. 1940); KAN. GEN. STAT. § 50-401 (Corrick, Supp. 1945); Ky. REV. STAT. §§ 365.030-070, 365.990 (1946); LA. GEN. STAT., c. 2A, § 4931.1 (Dart, Supp. 1947); ME. REV. STAT., c. 170, § 2 (1944); MD. ANN. CODE, Art. 83, §§ 111-115 (Flack, Supp. 1943); MASS. ANN. LAWS, c. 93, § 14E-K (1946); MICH. STAT. ANN., c. 278, § 28.31 (Supp. 1946) (bakery and petroleum products); MINN. STAT., c. 21A, § 3976-41 (Mason, Supp. 1946); MONT. REV. CODE, c. 112A, § 7590.3 (Supp. 1939); NEB. REV. STAT. § 59-1201 (1943); N. H. REV. LAWS, c. 204 (1942); N. J. STAT. ANN. § 56:4-8 (1939); N.D. REV. CODE § 51-10 (1943); OHIO GEN. CODE § 6402-10 (Page, Supp. 1945) (cigarettes); OKLA. STAT. ANN., tit. 15, § 591-97 (Supp. 1947); ORE. COMP. LAWS § 43-104 (1940); PA. STAT. ANN., tit. 73, § 211 (Purdon, Supp. 1946); R.I. LAWS 1939, c. 671, and LAWS 1941, c. 1039; TENN. CODE ANN., c. 38B, § 6770.7 (Williams, 1941); UTAH CODE ANN., tit. 16A, c. 4 (1943); VA. CODE, c. 61A, § 1463(1) (1942); WASH. REV. STAT. § 5854-21 (Remington, Supp. 1940); W. VA. CODE ANN., Art. 11A, § 4678(8a) (1943); WISC. STAT. § 100.30 (1945); WYO. COMP. STAT. § 39-407 (1945).

77. *Arizona*: The 1939 Act was held unconstitutional in *State v. Meyerson*, 2 P-H TRADE AND IND. SERV. (2d ed.) ¶ 97,151 (Prima County Sup. Ct. 1941), because criminal intent was not required for violation, and because of indefiniteness of terms defining invoice cost. But the state supreme court, in *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650 (1941), upheld the main provisions of the act, invalidating only the provisions (to which the lower court had objected) that disallowed cost calculations based on purchases which could not be "justified by prevailing market conditions in this state." (But note that identical requirements that invoice cost be based on local market conditions exist in the statutes of Conn., Idaho, Mass., Neb., R. I. and Tenn.)

California: *Balzer v. Caler*, 74 P.2d 839 (Cal.App. 1937) held the 1935 Act unconstitutional because of uncertainty in the prohibited conduct, and lack of uniformity in its effect on large and small sellers. This holding was reversed on appeal in 11 Cal.2d 663, 82 P.2d 19

they have survived.⁷⁸ While only a few courts have seen in them an attempt to gain economic advantages not stated in the revealed purposes of the legislation,⁷⁹ some courts appear to have recognized the economic implications

(1938), in an opinion deciding the companion case of Wholesale Tobacco Dealers Bureau of So. Calif. v. Nat'l Candy and Tobacco Co., 11 Cal.2d 634, 82 P.2d 3 (1938); see note 80 *infra*.

Maryland: Daniel Loughran Co. v. Lord Baltimore Candy and Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940), invalidated the 1939 Act on account of a cost calculation requirement similar to Arizona's, *supra*, and because the Act allowed a violation to be found where there was an intent, effect, or result of injuring competitors or destroying competition. The later Act remedied these defects by striking out the reference to "market conditions" within the state, and limiting the statute's application to sales made with an intent to injure, etc. Md. Laws 1941, c. 330; See Engleman v. Blum, CCH TRADE REG. SERV. '44-'47 Dec. ¶ 57,590 (Balt. Circ. Ct. 1947).

Michigan: The 1937 Act, dealing only with bakery and petroleum products, was held unconstitutional as to § 6, forbidding premiums or gifts, in *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939). The entire Act was found invalid, because of vagueness in defining cost and the inclusion of more than one subject in a single Act. *In re Frens and Dare*, Ingham County Circuit Court, (Chicago Tribune, Dec. 23, 1939, cited in FTC, REPORT ON RESALE PRICE MAINTENANCE 120 (1945)).

Minnesota: The federal court found the Act of 1937 offensive to the 14th Amendment because the presumed violation when sales were made below the required 10% mark-up was not justified, and for many other reasons. *Great A. & P. Tea Co. v. Ervin*, 23 F. Supp. 70 (D.C. Minn. 1938). With minor changes, the amended Act (Minn. Laws 1939, c. 403) passed a state court test in *McElhone v. Geror*, 207 Minn. 580, 292 N. W. 414 (1940).

Nebraska: The 1937 Act, lacking an intent requirement, was invalidated in *State ex. rel. English v. Ruback*, 135 Neb. 335, 281 N. W. 607 (1938); Neb. Laws 1941, c. 123, made intent or effect of injuring competitors or diverting trade a requisite for violation.

New Jersey: The 1938 Act, similarly lacking any requirement of intent, was declared unconstitutional for that reason. *State v. Packard-Bamberger & Co.*, 16 N. J. Misc. 479, 2 A.2d 599 (Dist. Ct. 1938), *aff'd*, 123 N.J.L. 180, 8 A.2d 291 (Sup. Ct. 1939).

Ohio: The Unfair Cigarette Sales Act was invalidated for failure to differentiate between the costs of service and cash-and-carry wholesalers; the Act was also found to have a tendency to fix uniform prices. *Serrer v. Cigarette Service Co.*, 74 N.E.2d 853 (Ohio Ct. App. 1947).

Pennsylvania: The 1937 Act, containing no intent requirement, was found invalid in *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A.2d 67 (1940), but Pa. Acts 1941, No. 344 forbids sales below cost made with the intent of injuring a competitor or with the result of deceiving any purchaser or prospective purchaser.

For treatment of the issues of constitutionality, see 86 U. of PA. L. REV. 780 (1938), 43 DICK. L. REV. 112 and 127 (1939), 6 U. OF CHI. L. REV. 329 (1939), 52 HARV. L. REV. 1142 (1939), 25 VA. L. REV. 851 (1939), 8 DUKE B.A.J. 42 (1940), 5 NEWARK L. REV. 172 (1940), 15 TULANE L. REV. 277 (1941), 36 ILL. L. REV. 682 (1942).

78. Of the statutes listed in note 76, *supra*, only those of Michigan, New Jersey and Ohio are now without effect, and the Arizona Act is limited only slightly.

79. The New Jersey court declared the Act involved "fixing the price of all goods" to "help a few selfish interests." *State v. Packard-Bamberger & Co.*, 16 N. J. Misc. 479, 482, 2 A.2d 599, 600 (1938). See *Commonwealth v. Hodin*, 34 Pa. D. & C. 270, 278 (1938). In *Serrer v. Cigarette Service Co.*, 74 N. E.2d 853, 855-6 (Ohio Ct. App. 1947), the Ohio court asserted, "An act which can be defended only on the basis that it . . . fosters competition is twisted to accomplish the direct opposite, namely, sale . . . at a uniform price." The Michigan court found its statute "savor[ed] of an attempt to [maintain] the prices and profits of those already in the business." *People v. Victor*, 287 Mich. 506, 511, 283 N. W. 666, 669 (1939).

of the acts and to have approved them.⁸⁰ Most judicial discussion of constitutional issues has, however, been preoccupied with such questions as the definiteness with which the conduct made criminal is described, and, particularly, the presence or absence of an intent to violate the laws.⁸¹ Although the statutes, as thus shaped by the courts, do not prohibit sales below cost unless made with an "intent"⁸² to injure competitors, or to deceive purchasers,⁸³ the shadow of intent is barely visible and its substance is

80. "That statute recognizes that there is such a thing as too much competition, and aims to restrain it. . . ." *Lichterman v. Laundry and Dry Cleaning Drivers Union*, 204 Minn. 75, 77, 282 N. W. 689, 690 (1938). The court held the Minnesota Act modified the restraint of trade concepts contained in the state's anti-trust act. See also: *Moore v. Northern Ky. Ind. Food Dealers Assoc.*, 286 Ken. 24, 149 S.W.2d 755 (1941). Fear of possible conflict with the state anti-trust law is suggested in a provision of the Massachusetts Unfair Practices Act declaring it shall prevail in case of conflict with other legislation. Mass. Laws 1938, c. 410, § 14I. Many courts, however, have gone to great lengths to find their Acts were not price fixing laws: e.g., *Jonke v. Save-a-Nickel Stores*, 2 P-H TRADE AND IND. SERV. ¶ 96,534 (Dist. Ct. Colo. 1937), *Carroll v. Schwartz*, 127 Conn. 126, 14 A.2d 754 (1940), *Assoc. Merchants v. Ormesher*, 107 Mont. 530, 86 P.2d 1031 (1939), *Rust v. Griggs*, 172 Tenn. 565, 113 S.W.2d 733 (1938).

The most perplexing economic reasoning is found in decisions which approve the price-fixing purposes of Unfair Practices Acts because resale price maintenance, which also involves price fixing (*supra*, note 3), has been approved. *State v. Langley*, 53 Wyo. 332, 84 P.2d 767 (1938); *Wholesale Tobacco Dealers Bureau of So. Calif. v. Nat'l Candy and Tobacco Co.*, 11 Cal.2d 634, 82 P.2d 3 (1938). In the influential *Tobacco Dealers* case, the California court considered arguments of *amici curiae* that the Unfair Practices Act "cannot possibly prevent . . . monopolies and will not foster free . . . competition . . . [but] will foster monopolies and . . . favor the large chain stores and large distributors as against the small merchant . . .," but it found these contentions "fairly debatable." *Id.* at 650, 82 P.2d at 12. It recalled having upheld the state resale price maintenance ("fair trade") law in *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177 (1936), *aff'd*, 299 U.S. 198 (1936), and it quoted its assertion there that "Economic and judicial thought . . . has [long] been divided on the economic question as to the benefits . . . of free and open competition, and its necessary corollary, price-cutting." *Wholesale Tobacco Dealers Bureau of So. Cal. v. Nat'l Candy & Tobacco Co.*, 11 Cal. 2d 634, 647, 82 P.2d 3, 11 (1938). The basic purpose of resale price maintenance and of sales below cost prohibitions, it held, was the same. Therefore, it found "applicable" the "theory" of Supreme Court decisions in the *Max Factor* case and in *Old Dearborn Distributing Co. v. Seagram Distillers*, 299 U.S. 183 (1936). Both these cases, however, justified resale price maintenance as a protection of the property of the brand-name owner, who would be damaged if his product fell into a price-cutter's hands. This factor, of course, is wholly lacking in the case of statutes dealing with sales below cost; the *only* "similarity" of purpose is that both types of legislation try to restrain competitive forces and achieve price stability. The analogy to resale price maintenance, therefore, serves to show that the court (although it denied the Act in question was a price-fixing law) considered the Act to have a price-fixing purpose, but it viewed this purpose as reasonable and desirable.

81. See Note 77 *supra*.

82. Oregon alone requires no "intent" for a violation of its statute.

83. Various wordings in the statutes suggest a confusion as to what precise deception is sought to be avoided. The Arizona Act, for example, forbids sales below cost where the intent or effect is to induce the purchase of other merchandise. Only three statutes refer to "bait selling,"—the advertising of bargain wares in short supply. The Tennessee Act for-

gone: where injury or deception is the *effect* or *result* of such sales, they are declared by the statutes to have been intended to injure or deceive,⁸⁴ and in many states a *prima facie* case arises (or there is "presumptive evidence" of intent⁸⁵) on the mere making of a sale below cost.⁸⁶

Once such a sale is shown, therefore, it is difficult for the seller to prove his innocence, and the crucial question under the acts thus comes down to what amounts to "cost" and how it may be proved. Nine of the statutes,⁸⁷ not confining themselves to distributive trades, deal also with producers⁸⁸ and define their costs as "the costs of raw materials, labor and all overhead expenses."⁸⁹ The remainder refer only to costs of wholesalers and retailers,

bids a sale the "intent, effect or result" of which is to "deceive or mislead any purchaser or prospective purchaser." The idea seems to go back to Brandeis' declaration, *supra* note 12, that "a loss-leader is a mis-leader."

84. Even though the injurious effect or result is not shown, a below-cost seller has usually been held to the knowledge that his sales, or even his advance advertisements of them, would injure competitors or deceive purchasers. *Mering v. Del Paso Market*, 2 P-H TRADE & IND. SERV. ¶ 96,603 (Cal. Super. Ct. 1936); *Dikeou v. Food Distributors Ass'n*, 107 Colo. 38, 108 P.2d 529 (1940); *Rust v. Griggs*, 172 Tenn. 565, 113 S.W.2d 733 (1938). Despite the objection of the Maryland court in the Lord Baltimore case, *supra* note 77, that such statutory wording forbade virtually *all* sales below cost, since the seller could never tell, as a practical matter, when the distant "effect" or "result" of his sale might injure a competitor or deceive a customer, this pattern remains a normal one in other jurisdictions.

85. This wording appears in the California law (*supra* note 76, § 17071).

86. Such statutory presumptions are found in various forms in the statutes of Arizona, California, Connecticut, Idaho, Kansas, Louisiana, Maine, Massachusetts, Maryland, Minnesota, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, West Virginia, Washington and Wisconsin. They lend great strength to the statutes, forcing the accused seller, in order to avoid a directed verdict, either to dispute what his "costs" are (see note 105 *infra*) or attempt an almost hopeless proof of innocent intent. In thus laying the burden on a price-cutter, these statutes vigorously enact the theory of "justification," discussed *supra* note 8. Generally, the legal test of validity of such a statutory presumption is said to be the reasonableness of the relationship between the fact proved or alleged and the fact presumed. See Notes, 1941 Wis. L. REV. 425, 431; 162 A.L.R. 495, 532 (1946). On this basis, the federal court in *Great A. & P. Tea Co. v. Ervin*, 23 F. Supp. 70, 80 (D.C. Minn. 1938), found the presumption unreasonable because there were "many reasons, aside from a desire to injure competitors, which might induce a merchant to make profitless sales of goods." But the Minnesota statute there held unconstitutional was soon reenacted with a provision making sale at less than 8% above manufacturer's list price *prima facie* evidence of violation.

There have been occasional judicial attempts to rescue the intent supposedly necessary for violation of the Acts. The Wisconsin court in *State v. Twentieth Century Market*, 236 Wis. 215, 294 N.W. 873 (1940), did not give effect to the presumption of an intent to injure created by its statute, and in *R. R. Commr's v. Sawyers' Stores*, 114 Mont. 562, 138 P.2d 964 (1943) (applying a statute which did not contain the presumption), the sale below cost was said to give rise to no presumption of an intent to injure. And see *People v. Pay Less Drug Store*, 143 P.2d 762 (Cal. 1943), *aff'd*, 25 Cal.2d 108, 153 P.2d 9 (1944); *Miller's Groceteria Co. v. Food Distr. Ass'n*, 107 Colo. 113, 109 P.2d 637 (1941); *Kentucky Utilities Co. v. Commonwealth*, 274 Ky. 151, 118 S.W.2d 158 (1938); *Op. Att'y Gen., Minnesota, CCH TRADE REG. SERV.* '44-'47 Dec. ¶ 57,618.

87. Ark., Cal., Colo., Ky., Mont., Ore., Utah, Wash., and Wyo.

88. There is no litigation showing application of any of these acts to producers.

89. This typical wording appears in § 17026 of the California Act, *supra* note 76.

and state the minimum level to be invoice cost plus the "cost of doing business" according to one of two general formulae. Under the one type of act, costs of doing business, "in the absence of proof of a lower cost," are established as six percent (or more) of the retailer's total invoice cost, and two percent for the wholesaler.⁹⁰ The other type of statute, following the lead of California, does not prescribe a fixed percentage to represent "cost of doing business," but lists as its components an exhaustive array of overhead expenses such as labor, rent, salaries, depreciation, credit losses, and advertising.⁹¹ Under this definition, the trade association with its averaged cost estimate is given as much scope as was sought in earlier schemes of cost protection, for a parallel provision in acts of this type makes "an established cost survey," conducted by an association in the trade of which the offender is a member, competent evidence to prove the offender's actual cost of doing business.⁹² Whatever percentage the trade association lays down, when added to invoice cost,⁹³ appears to determine the "costs" which this type of legislation will protect, for there are virtually no requirements to be met by a "cost survey" before it is entitled to play its significant role in cost definition.⁹⁴

90. Acts of this type exist in Ariz., Conn., Idaho, Kan., La., Mass., Me., Md., Minn., N. H., Neb., Okla., Ohio, Penn., R. I., Tenn., Utah, Va., W. Va., and Wis. The retail mark-up required is 4% in Penn., 5% in Md., 7% in W. Va., 8% in Idaho and Minn., and 12% in Ariz. Minnesota also encourages a 15% mark-up by declaring sales above that figure are not violations. The effect of forcing the seller to prove a lesser mark-up than the statute presumes is similar to the presumptions of intent arising from a sale or advertisement. See note 84 *supra*. Only North Dakota has neither a presumed percentage nor a cost survey; costs protected appear to be only invoice costs plus delivery charges.

91. See § 17029 of the California Act. And see note 18 *supra*.

92. Sections authorizing cost surveys as proof of costs exist in the statutes of the 9 states listed in note 87 *supra*, plus Ohio and Michigan. Ohio combines the cost survey with a presumed mark-up of 6% for retailers and 2% for wholesalers; Oregon provides a 6% retail mark-up for food retailers in addition to the cost survey.

93. If the merchant fails to produce invoice records on the ground of self-incrimination, wholesalers' shipment records can be used to establish invoice cost. *Mering v. Yolo Grocery & Meat Market*, 53 Cal. App. 410, 127 P.2d 985 (1942). Several statutes specifically provide that manufacturers' list price less published discounts will constitute invoice cost, at least to establish a *prima facie* case.

The cost survey (or statutory) percentage must apparently be added to *all* items and departments, without exception for fast-moving goods on which a lower mark-up might well be made. GREYER, *op. cit. supra* note 3, at 364-5; *accord*, *McFadden Lambert Co. v. Winston & Newell*, 209 Minn. 242, 246, 296 N.W. 18, 19 (1941).

94. The danger that cost surveys would be manipulated by trade groups to achieve an "average" cost that guaranteed standard prices was early appreciated (Taggart, *The Established Cost Survey*, 20 N.A.C.A.BULL. 145 (1938)), and several requisites were suggested to be met before such surveys were given evidentiary weight under the Acts. Taggart, *The Cost Principle in Minimum Price Legislation* 179, 182 (8 U. OF MICH. BUS. STUDIES No. 3, 1938). But there is every indication that trade associations have a free hand in conducting their "surveys" and concluding what their members' "costs" are. The initial cost survey made by the Food & Grocery Bureau of Southern California consisted of a questionnaire addressed to members which read:

Under both types of statute, elaborate provisions are made as to the legitimacy of deducting various discounts or taking advantage of bargain purchases,⁹⁵ and the necessity for adding various expenses, whether or not they are actually incurred,⁹⁶ in arriving at invoice cost. Several statutes also forbid premiums and gifts.⁹⁷ As under the NRA codes, an exception con-

"Based on my total grocery sales for the year 1936, I find that my minimum cost of doing business is —% of my net sales."

and the next year's form suggestively read:

"Based on my total grocery sales for 1937, I find that my minimum cost of doing business has increased approximately —% over my previous cost. . . ."

TANNENBAUM, *op. cit. supra* note 13, at 50, 51. This survey, which resulted in establishing an 8% mark-up in the area for 1937, was "quite successful in avoiding price wars." *Ibid.* And in San Francisco, a minimum mark-up of 8% in 1938 was determined by the Retail Grocers Assoc. on the basis of a post card questionnaire sent to "various members." FTC, REPORT ON RESALE PRICE MAINTENANCE 855 (1945). Tobacco wholesalers in Northern California increased their percentage mark-up from 3% (as under NRA) to 4% on the basis of records kept by their association secretary "in a little black book." *Id.* at 863.

Instances in which cost surveys have been refused by the courts suggest the extremes to which they have been carried. In *Civic Ass'n of Wyo. v. Railway Motor Fuels*, 57 Wyo. 213, 116 P.2d 236 (1941), the court rejected as self-serving a survey made, after litigation against the price cutter had begun, by competing petroleum dealers who called themselves the "Civic Association." The survey was based on 27 returned questionnaires, 14 returns having been rejected, and it found costs to be 26% of net sales. Note the NRA experience with cost surveys to establish minimum prices, such as that conducted in the paint and varnish industry, where 160 out of 2000 firms were questioned, 34 out of 74 replies were rejected, and the remainder formed the basis for the price established. *Wilcox, op. cit. supra* note 23, at 261. And in *Johnson v. Farmer*, 41 Cal. App. 2d 874, 107 P.2d 959 (1940), even the California court balked at a cost survey for photoengraving which was actually a national uniform cost list, published in 1932 by the American Photo-Engravers Association as a "Standard Scale" for fixing prices. In *State v. Sutton*, 2 Wash.2d 523, 98 P.2d 680 (1940), the court, refusing to uphold an injunction to restrain sale of tobacco products below the "cost survey" level, found the survey itself antagonistic to the stated purposes of the Act. "The statute does not . . . provide," it declared, "that . . . merchants of any . . . class may set prices to which all other merchants must conform." (Italics added.)

Many statutes require that the cost survey be for the "area" or "locality" in which the alleged violator does business. *Cf. Great A. & P. Tea Co. v. Ervin*, 23 F. Supp. 70, 83 (D.C. Minn. 1938). But when the Montana court in *R. R. Comm'r's v. Sawyers' Stores*, 114 Mont. 562, 138 P.2d 964 (1943), refused to accept a state-wide survey, the legislature promptly amended the act to make such a survey acceptable (Laws of 1945, c. 21), thus demonstrating the importance attached to the cost survey as a method of insuring price uniformity.

95. Such provisions, commonly excluding purchases made at forced sales and bankruptcy liquidations, are similar to those found invalid in the Arizona and Maryland Acts, see note 77 *supra*, which did not allow the price cutter to justify his costs by proving purchases which his competitors could not duplicate. This prohibition against passing on the advantage to the consumer was first countenanced, but then disallowed, by the NRA uniform accounting regulations, see note 57(a) *supra*.

96. Delivery costs from the wholesaler are commonly specified at a certain percentage of invoice cost. These must be included in cost calculations even if a retailer buys direct and does not pay them. *Utah Atty. General's Opinion*, Dec. 3, 1946, CCH TRADE REG. SERV. '44-47 Dec. ¶ 57,520.

97. Some statutes prohibit gifts directly (e.g., Colorado; California, see *Food & Groc.*

tained in many of the acts seems to permit a seller to meet the lower prices of a competitor without being guilty of violation,⁹³ but often one who relies on this excuse for price reductions must take the risk that his competitor's prices are not themselves in violation of law.⁹³

Much of the effectiveness of the legislation in policing prices rests on provisions permitting injunctive relief against threatened price reductions,¹⁰⁰ and allowing suit to be brought by any injured party¹⁰¹ or, under some statutes, by anyone at all, whether or not he has been or may be injured by

Bureau v. Blue and Gold Stamps, 2 P-H TRADE & IND. SERV. ¶ 97,153 (Cal. Super. Ct. 1941)) while others appear to prevent a gift of one item, contingent on the purchase of another, by requiring that each item in a combined sale be subject to the cost definitions of the act. See the Mass. statute, *supra* note 76, § 14E(c). Although the Wisconsin act formerly contained an approximately similar requirement, and the Attorney General had ruled that contingent gifts of merchandise were forbidden, since the gift item was obviously sold below cost (2 CCH TRADE REG. SERV. ¶ 8948.11 (1945)), it was held the act did not have this effect. *State v. Tanker Gas*, 26 N.W.2d 647 (Wisc. 1947) (gift of 2 gallons of gasoline to purchasers of 7 gallons did not offend the act unless the price for which 7 gallons were sold was below cost of the entire 9 gallons). But the legislature promptly revised the act so that "the price of each item" is "subject to the requirements" of invoice cost plus 6%. Laws of 1947, c. 23; see 2 CCH TRADE REG. SERV. ¶ 8948.001 (1947).

State legislation prohibiting use of trading stamps has been held "due process" under the 14th Amendment, *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), but the Michigan court held invalid part of its Unfair Practices Act which was applied to prevent gifts of premiums with the sale of gasoline. *People v. Victor*, 287 Mich. 506, 283 N.W. 666 (1939); *Sperry & Hutchinson Co. v. Prosecuting Att'y of Kent County*, 287 Mich. 555, 283 N.W. 686 (1939). And Massachusetts has found unconstitutional, as an arbitrary interference with business, a provision in its Motor Fuel Sales Act, MASS. ANN. LAWS, c. 94, § 295A-O (1946), which, while it did not govern retail prices, forbade premium gifts which amounted to a concealed reduction in the stated price. *Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 30 N.E.2d 269 (1940), 131 A.L.R. 1254 (1941). The attempt to prevent premiums, gifts and trading stamps is not, of course, an expression of the cost protection principle, but it serves equally well to prevent deviations once a uniform price structure has been established.

98. Exception is also frequently made for sale of perishable or damaged goods, and sales to charitable institutions, etc.

99. See TANNENBAUM, *op. cit. supra* note 13, at 55. One who cuts prices to meet those of his rival has been said to have the burden of justifying his competitor's prices. Minnesota Att'y General's Opinion, 2 CCH TRADE REG. SERV. ¶ 8428.40 (1941). *Contra*: *State v. Sears*, 4 Wash.2d 200, 103 P.2d 377 (1940). But if the illegality of the competitor's prices is apparent, rivals cannot meet them, but must follow remedies given by the act. *Better Business Bureau v. Consolidated Appliance Dealers*, 2 P-H TRADE & IND. SERV. ¶ 97,033 (Cal. Super. Ct. 1940). The Kansas Act specifically lays on a price cutter the burden of proving his good faith attempt to meet competition.

Many of the Acts make exception for duly advertised bona fide closing-out sales, allowing them to take place below cost. Competitors cannot meet such prices, though they reasonably believe the closing-out is *not* bona fide. *Sontag Drug Co.*, 2 P-H TRADE & IND. SERV. ¶ 96,609 (Cal.) (\$1,000 in fines imposed).

100. 22 statutes permit injunctive relief.

101. 18 statutes allow any person or corporation injured, or threatened with injury, to seek relief.

the actual or threatened violation.¹⁰² Action against the price-cutter may therefore be immediate and direct, with refined arguments as to the level of costs reserved for the litigation to follow, and a trade association or parallel private body may constitute itself an effective agency to enforce the law.¹⁰³ Further increasing the effectiveness of the legislation is the fact that penalties for violation are serious,¹⁰⁴ and the difficulties of overcoming presumptions of cost or the results of cost surveys are great;¹⁰⁵ thus, the mere threat of litigation is probably the principal method of the acts' enforcement.¹⁰⁶

Viewed in light of the general analysis of the cost protection theory set out above,¹⁰⁷ several years of experience under the statutes reveal them as

102. California's act, *supra* note 76, § 17070, permits "any person or trade association" to bring an action, and five other statutes are similar. No allegation of irreparable harm or of actual damage need be made. *Food & Grocery Bureau v. Smith Metropolitan Market Co.*, 2 P-H TRADE & IND. SERV. ¶ 96,608 (Cal. Super Ct. 1939). And see *Heffelfinger v. Safeway Stores*, 2 P-H TRADE & IND. SERV. ¶ 97,087 (Colo. Dist. Ct. 1940). *Contra*: *Eckdahl v. Hurwitz*, 56 Wyo. 19, 103 P.2d 161 (1940).

103. Idaho, Kan., N. H., and N. D. provide for proceedings to be brought by public officers. Other statutes permit district attorneys and attorneys general to bring actions to restrain violations, while they also give private persons the same power. And see note 112 *infra*.

104. 26 acts contain criminal penalties. A few make void contracts which violate the law, and some provide that offending corporations may lose their charters. Eight states also award treble damages to an injured plaintiff.

105. The price cutter who attempts to justify his prices, by claiming costs lower than those presumed in the statute or cost survey, is in a difficult position. The flexibility of cost accounting procedures (notes 13-15 *supra*), instead of making it easier for him to justify his prices, seems to give greater strength to plaintiffs, for they can argue that the violator's accounting justifications are merely self-serving measures. Thus defendant in *Dikeou v. Food Distributors Ass'n*, 107 Colo. 38, 108 P.2d 529 (1940), accused of selling tobacco products at a price below his "cost of doing business," attempted to show that his cash sales, which had been challenged, could be profitably made below the mark-up established in the cost survey, while his credit sales carried higher costs. *Held*: his accounting justification was "in bad faith," having been undertaken after litigation began, and the cost survey, representing a reasonably approximate distribution of costs, would prevail. *Cf.* *State v. Zimmerman*, 2 P-H TRADE & IND. SERV. ¶ 97,164 (Wash. Sup. Ct. 1941), where defendant established his cost as 16% of sales though the survey showed 21%-37%.

Probably few except the larger merchants are even equipped to begin a defense when accused of sales below cost, because their cost records are not precise, see Taggart, *The Cost Principle in Minimum Price Legislation* 158 (8 U. OF MICH. BUS. STUDIES No. 3, 1938), and the expense of enlisting expert assistance in proving their "real" costs is heavy.

106. Direct warnings to retailers who advertised products below desired price levels were one of the principal weapons of the Connecticut Food Council. (*See* *United States v. Conn. Food Council*, Civ. Action No. 680 (D. Conn. Nov. 5, 1941)). The Food Trades Institute in San Francisco kept close watch on all food prices and promptly required low prices to be raised. FTC, REPORT ON RESALE PRICE MAINTENANCE 855 (1945). The threat of litigation was also the most effective force behind the NRA sales-below-cost prohibitions and state fair-advertising statutes. MACK, *op. cit. supra* note 55, at 216-24, 445-8.

The effectiveness of such threats in enforcing the Unfair Practices Acts may account for the comparatively small number of litigated cases.

107. See pp. 396-402 *supra*.

particularly undesirable. Although the statutes state as their purpose the protection of free competition, and the courts have generally agreed that they are intended "to prevent monopolies,"¹⁰⁸ "to prohibit destructive competition,"¹⁰⁹ or "to prevent anarchy in commerce,"¹¹⁰ the record has not shown their sanctions applied to protect small sellers against large-scale campaigns of underselling;¹¹¹ on the contrary, the laws have been used primarily by trade associations and larger units¹¹² in order to prevent local price cutting and to enforce the disciplined system of price leadership which these units desire to establish. Moreover, there is some evidence that the acts have been utilized as a means of *raising* prices.¹¹³

108. *Heffelfinger v. Safeway Stores*, CCH TRADE REG. SERV. (8th ed. Supp.) ¶ 25,503 (Colo., 1940).

109. *State v. Zimmerman*, 2 P-H TRADE & IND. SERV. ¶ 97,164 (Wash. Sup. Ct. 1941).

110. *Better Business Bureau v. Shuttles*, 87 S.W.2d 299 (Tex. Civ. App. 1935).

111. The suit in which a prominent chain-store is named defendant or is found in violation of a statute can hardly be discovered. In one (unreported) case, an organization of large retailers sought an injunction against A. & P. in the California court, but suit was withdrawn when an action was instituted in the federal court challenging the California Act as a burden on interstate commerce. FTC, REPORT ON RESALE PRICE MAINTENANCE 860 (1945).

During the period when, as shown in *United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946) the entire New England division of A. & P. was selling at an overall loss in order to build volume, A. & P. was not prosecuted under Acts of any of the New England states for violations; it joined with First National Stores and other large wholesalers to enforce the Acts through Food Councils operating in Connecticut, Massachusetts, Maine and Rhode Island. 2 CCH TRADE REG. SERV. (9th ed.) ¶ 8348.15, 8748.10-40 (1941); *United States v. Conn. Food Council*, Civ. Action No. 680 (D. Conn. Nov. 5, 1941; consent decree).

112. See, e.g., the sponsorship of the New England Food Councils, *supra* note 111. In California, the Food Trades Institute (San Francisco), the Food Industry Bureau (Oakland), and the Food and Grocery Bureau of Southern California (Los Angeles), were formed to enforce the Act and were all supported by the chains and other large distribution interests. FTC, REPORT ON RESALE PRICE MAINTENANCE 854-6 (1945). Tobacco and liquor enforcement agencies had similar backing. *Id.* at 863, 867-9. And see the abortive attempt of dominant building material supplies to utilize the Act to enforce a 20% price increase. *Met. District Material Dealers Ass'n v. Eastside Bldg. Materials Co.*, 2 P-H TRADE & IND. SERV. ¶ 97,078 (Cal. Super. Ct. 1940). It would seem that the consumer pays for costs of enforcement: the Washington Attorney General has approved a tariff of one-cent per carton on cigarettes to finance an enforcement agency established by wholesale grocers and tobacconists (see 2 CCH TRADE REG. SERV. ¶ 8909.40 (1940)); and in Los Angeles, canned milk consumers were selected to bear enforcement costs, amounting to one cent per case. *United States v. Food & Grocery Bureau*, 43 F. Supp. 966 (S.D. Cal. 1942). The formation of enforcement agencies has been avoided in Montana by resting enforcement powers in a commission; but its subservience to cost protection purposes is indicated by its practice of approving any cost survey signed by three-fourths of the members of a trade. GREYER, *op. cit. supra* note 3, at 367. Louisiana has also recently created a Board of Trade Relations to enforce its Act, but "any person" threatened with damage may still bring an action to enjoin violation. And although Utah has given its Trade Commission enforcement powers, "any person," whether injured or not, may seek an injunction.

113. In the San Francisco area, cost surveys successively raised the required mark-up from 6% in 1937 to 10% by 1940, when there was agitation to raise it to 12%. Each of these increases was enforced in higher prices, and grocers who opposed them were unable to gain a

CONFLICT BETWEEN THE STATUTES AND FEDERAL ANTI-TRUST LAWS

But the success of the statutes may prove only temporary. For, to the extent that such statutes constitute a form of *private* regulation of the market rather than *state* regulation, they may run afoul of the Sherman Act, which prohibits private restraints of trade affecting interstate commerce.¹¹⁴ Already the FTC and the Anti-trust Division of the Justice Department have made successful moves against private enforcement activities in several areas.

Western Confectioners Association: An example is provided by the FTC proceedings in regard to the Western Confectioners Association.¹¹⁵ This group of candy makers and sellers, holding a dominant position in ten western states, undertook to enforce the California Unfair Practices Act in the candy trade. The association's first step was to make the usual cost survey.

The resultant enforcement activities, though apparently normal under the statute, appeared to the Commission to be a program of "aiding and abetting in instituting court proceedings against manufacturers selling at prices below the costs" ¹¹⁶ found by the Association's survey, and of "disseminat(ing) threats . . . that any manufacturer who sold below the cost figures adopted would be prosecuted under the . . . Act." ¹¹⁷ Prices, the Commission found, had been stabilized and increased through the Association's program. The Commission, therefore, found Western Confectioners in violation of Section 5 of the Trade Commission Act,¹¹⁸ and ordered an end to price fixing and attempting to "coerce other manufacturers by threats of legal action or otherwise, to maintain uniform and minimum prices." ¹¹⁹ But although the Commission found an intent in the Association's "conspiracy" to make the cost survey a basis for minimum prices, it did not

hearing. FTC REPORT, at 856. And see Findings in Western Confectioners Assn., 34 FTC 1431 (1942), as to effect on prices. An FTC comparison of prices charged by chains operating both in Virginia, where the Act provides an 8% mark-up (6% retail, 2% wholesale), and in the District of Columbia, where no such act applies, found Virginia prices consistently higher. FTC REPORT, at 866. *But cf.* Grether, *The FTC vs. Resale Price Maintenance*, 7 J. OF MARKETING 1, 4 (1947), who calls the survey "inconclusive." See also note 94 *supra*. It may be noted that while supporters of resale price maintenance have argued that some prices are reduced by its requirement of a stated, advertised price, no such claims can be made for the unfair practices legislation.

114. *Fashion Originator's Guild v. FTC*, 312 U. S. 457 (1941); *Parker v. Brown*, 317 U. S. 341 (1943).

115. 34 F.T.C. 1431 (1942).

116. *Id.* at 1441. It appears that the association encouraged members to litigate as well as proceeding in its own behalf.

117. *Ibid.*

118. This finding resulted despite the efforts of twenty-seven attorneys who appeared for the defense.

119. *Id.* at 1457-8. A similar order was issued against liquor distributors whose operations under the Unfair Practices Act in California were viewed as price fixing. Wholesale Liquor Distributors' Ass'n of No. Calif., 31 F.T.C. 1453 (1940).

allege or find fraud or misrepresentation in the survey itself.¹²⁰ Nor were enforcement measures, taken after the survey became "established," shown to be different or in any way more restrictive than what appear to be the expected, necessary methods of trade associations in enforcing the California statute. Certainly warnings to an alleged violator of the law are not in general disapproved, where some genuine cause of action does exist. Yet the Commission, with good reason, found that such warnings by this Association were part of a scheme to set minimum prices and were therefore unlawful. It denied to the Association the ability to use the California statute, for the apparent reason that the use already made had succeeded in realizing the statute's objectives. If it is assumed there is a sphere of activity which the Association could have legitimately pursued under the Commission's standards, while still fulfilling the role of cost surveyor and plaintiff which the Act created for such a trade association, it is hard to see where this defendant went beyond that sphere. For nothing which it did was offensive to the California statute or beyond its contemplation; lesser activities would have left the statute without effect in the confectionery field. In the Commission's view, the central element of illegality was the demonstrated intent to *utilize* the California statute to stabilize the market and establish minimum prices. But this aim seems clear in the statute itself and in its whole enforcement machinery; in effect, then, the Commission found the state statute restrictive when it condemned the practices of this Association.

*The New England Food Councils:*¹²¹ A similar history is revealed in consent decrees filed in Justice Department actions against the New England Food Councils, except that the statutes these Councils enforced did not authorize the cost survey, but required a fixed mark-up unless the seller proved a lesser cost. The Connecticut Council, for example, brought actions against violators, warned grocers against violation, and published current minimum prices which would comply with the law. It also assisted grocers in establishing standards and methods of computing costs of doing business.¹²² The Government alleged that the Council was a price-fixing

120. The Commission noted that the purpose of the survey was revealed to the members, but it did not stress this point or mention it in the order. Compilation of the surveys was made by a separate tabulating agency. *Western Confectioners Ass'n*, 34 F.T.C. 1431 (1942).

121. *United States v. Conn. Food Council*, Civil Action No. 680 (D. Conn., Nov. 5, 1941) (Consent decree); *United States v. Mass. Food Council*, 2 P-H TRADE & IND. SERV. ¶ 27,460 (D. Mass. 1941); *United States v. Maine Food Council*, 2 CCH TRADE REG. SERV. ¶ 8348.15 (D. Me. 1941); *United States v. R. I. Food Council*, 2 CCH TRADE REG. SERV. ¶ 8748.10-40 (D. R. I. 1941). See also, *United States v. Washington Wholesale Grocers Assoc.*, CCH TRADE REG. SERV. 1941-43 Supp. ¶ 52,837 (W.D. Wash. 1942); *United States v. Washington Wholesale Tobacco and Candy Distributors, Inc., Id.*, ¶ 52,846 (W.D. Wash. 1942).

122. The encouragement of uniform accounting methods (see note 18 *supra*), in addition to advancing usual aims of cost protection, was probably intended to make it more difficult for violators (who had adopted the system) to contend that their costs were less than the six percent statutory mark-up.

combination in restraint of trade, and that it "did not intend to promote the declared purpose of the . . . [Connecticut] Act."¹²³ The decree dissolved the Council and enjoined individual and corporate defendants from threatening litigation, suggesting minimum prices, and computing "an average, normal or uniform cost of doing business . . . or establish[ing] standards or methods for such computation."¹²⁴ Thus, the very cost survey, so vital a part of the legislation in other states, was forbidden to these defendants, and, except for individual suits, they were prevented entirely from enforcing the cost-protection statute or contributing to any organization formed to "police . . . or administer state laws which restrict sales below cost."¹²⁵ Here again, the facts strongly suggest that the Council was proceeding in an unexceptional manner to enforce the statute exactly as it was intended to be enforced;¹²⁶ as a part of this effort, the Council was reasonably seeking to prevent violations before they occurred. But since its activities constituted a form of price-fixing, there can be little doubt of their illegality under the anti-trust laws.¹²⁷

*The California Anti-trust Cases:*¹²⁸ A less resounding victory was won by the Anti-trust Division in actions brought against enforcement bodies in San Francisco and Los Angeles, where the trade groups themselves and several of their members were found guilty of violations of § 1 of the Sherman Act. Considerable evidence in both cases showed a dominant purpose of the groups concerned to obtain price stability and elevate minimum market levels.¹²⁹ The Los Angeles unit—the Food and Grocery Bureau—followed

123. Complaint, *United States v. Conn. Food Council*, *supra* note 121.

124. Decree, *United States v. Conn. Food Council*, *supra* note 121.

125. *Ibid.* The decree also forbade further warnings based on the legal facts that sales below cost were unlawful, and required statement of the fiction that only sales with an intent to injure were unlawful.

126. The conclusion that the Council was using and not abusing the Connecticut statute is supported by statements of counsel who prosecuted the successful test case under the statute, *Carroll v. Schwartz*, 127 Conn. 126, 14 A. 2d 754 (1940), and represented the Council in the anti-trust suit. Because of the "discouraging . . . sanctions of the Federal Government," he is "positive that no group in Connecticut will ever get together again to undertake enforcement of the Act," while the litigation difficulties are such that "no individual would undertake the burden of legal procedure." Letter of A. A. Ribicoff to the writer dated May 5, 1947. Thus, any activity which makes the Act more than a dead letter will collide with the anti-trust laws, and it is apparent the Act's sponsors did not intend useless legislation.

127. See note 6 *supra*.

128. *California Retail Grocers & Merchants Ass'n v. United States*, 139 F.2d 978 (C.C.A. 9th 1943), *cert. denied*, 322 U. S. 729 (1944); *United States v. Food & Grocery Bureau of Southern California*, 41 F. Supp. 884 (S.D. Cal. 1941), 43 F. Supp. 966 (S.D. Cal. 1942), 43 F. Supp. 974 (S.D. Cal. 1942); *Food and Grocery Bureau of Southern California v. United States*, 139 F.2d 973 (C.C.A. 9th 1943). Similar actions alleging price-fixing activities under Unfair Sales Acts were brought in *United States v. Tennessee Retail Grocers Ass'n*, 2 CCH TRADE REG. SERV. ¶ 8808.40 (D. Tenn. 1942), (dismissed), and in *United States v. Wholesale Tobacco Dealers Bureau of Southern California*, 1 CCH TRADE REG. SERV. ¶ 1021.542 (S. D. Cal. 1941, unreported).

129. The San Francisco Food Trades Institute published minimum prices each week,

prices of some food products from day to day, instructing grocers what to charge for them.¹³⁰ But the defense in both cases, which was that these activities were *authorized* under the California Unfair Practices Act, was a troublesome one.¹³¹

In the Los Angeles case, Judge Yankwich experienced great difficulty with this argument.¹³² He recognized that the Bureau was engaged in that type of trade association activity which constantly seeks to subjugate market forces to the advantage of competing producers. He quoted,¹³³ not from the Supreme Court's *Maple Flooring*¹³⁴ and *Cement*¹³⁵ cases, which gave wide latitude to price supporting devices of the trade associations there involved, but from the much more strict and realistic holding in the *Hardwood* case,¹³⁶ which had condemned all aspects of that association's program. He reasserted the recent strong position of the Court regarding price fixing under the anti-trust laws, and declared a violation of those laws occurred whether prices were agreed upon "at a maximum or at a minimum, or [by] a formula . . . adopted for arriving at [them]." ¹³⁷ This led him to a sharp denunciation of defendant's entire course of conduct in establishing a cost survey,¹³⁸ declaring prices which followed the statutory formula, and threatening to prosecute any sales below that level. Yet, he found the statute itself unobjectionable,¹³⁹ and this unwillingness to hold the state legislation

based on its cost surveys, as part of a "Price Stabilization Program." Retailers were warned that "[T]his program has been sanctioned unanimously by the larger grocery operators," and "[a]ny violation . . . will subject you to prosecution under the law." *California Retail Grocers & Merchants Ass'n v. United States*, 139 F.2d 978, 980 (C.C.A. 9th 1943). And see note 130 *infra*.

130. *United States v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 974, 978 (S.D. Cal. 1942). The agency in one bulletin issued to retailers asked "the entire trade to sell no brand of Oleomargarine at less than 12½ cents per pound. Kindly observe this price at once." In another it showed its hand by urging that grocers use its cost-survey quotations rather than what they might consider "their own costs"; otherwise, "our price structure will quickly break down." *Id.* at 979.

131. The San Francisco case (opinion unreported) found defendants had gone beyond the scope of the Act, but in what way is not made clear. *California Retail Grocers & Merchants Ass'n v. United States*, 139 F.2d 978 (C.C.A. 9th 1943).

132. *United States v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 974 (S.D. Cal. 1942).

133. *Id.* at 978-9.

134. See notes 35, 37 *supra*.

135. *Supra* note 36.

136. *Supra* note 33.

137. *United States v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (S.D. Cal. 1942).

138. There was, however, no more specific criticism of the methods or standards employed in conducting this survey than there was in the *Western Confectioners* case, *supra* note 115. So far as appears, no fraud was practiced.

139. "[A] State may, within its boundary, regulate trade practices, so as to prevent unhealthy competition." *United States v. Food & Grocery Bureau*, 43 F. Supp. 966, 972 (S.D.

inconsistent with the Sherman Act forced him to attempt another answer to the conspirators' defense. This answer was contained in an extremely vague passage which certainly leaves much to be decided:

"[The Act is not] a violation of the anti-trust statute. It forbids certain practices. And had the Bureau limited itself to advising the Trade, from time to time, as to the manner of complying with it, had they been satisfied with issuing, from time to time, real surveys to guide persons in fixing their prices, there, probably, would have been no prosecution."¹⁴⁰

As a result, upon appeal, the circuit court in this case, as in the San Francisco case, found it unnecessary "to determine whether the enforcement of the . . . Act [by itself] would violate the Sherman Act."¹⁴¹ By way of dictum, however, the court observed that California had held its Act not to be a price fixing law, but merely a measure to prevent intentional injuries to individuals.¹⁴²

But what realm of activity, it may be asked, is left to defendants by the district court decision? The enforcement agency still exists; it can enforce the California statute and, presumably, both prosecute and threaten to prosecute apparent violators of the law. It cannot post minimum prices every day, but only "from time to time," to "advise the Trade." It cannot make biased or artificial cost surveys, but only "real surveys." And these may still "guide persons in fixing their prices," since they are still presumptive evidence of costs under the statute.¹⁴³ The Bureau, therefore, as a convicted violator of the federal law, may do everything just a little less, and with a purer heart, than it did before and "*probably*" it will not again violate the law. It may still make use of the statute to obtain by less obvious, perhaps, but no less effective methods, the uniformity of minimum price, the protection of costs, and the avoidance of price competition which it was the purpose of cost-protection legislation to accomplish. Thus, although the court here recognized the basic conflict between the Bureau's activities and the federal anti-trust laws, it was apparently unwilling to put an end to the illegal conduct.

None of these cases squarely faced the issue of whether the statutes themselves conflict with the federal anti-trust laws, yet each gives strong indica-

Cal. 1942). He also found defendants' activities in gaining passage of the Act were lawful, though the prosecution had argued that these constituted part of the conspiracy in restraint of trade. *Ibid.*

140. *Id.* at 980.

141. *Food & Grocery Bureau of Southern California v. United States*, 139 F.2d 973, 974 (C.C.A. 9th 1943). And see note 131 *supra*.

142. This holding, in *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.*, 11 Cal.2d 634, 82 P.2d 3 (1938), based on the wholly unreal analogy between the legal purposes of Unfair Practices and resale price maintenance legislation, impliedly admitted the price-fixing character of the Act. See note 80 *supra*.

143. CAL. BUS. & PROF. CODE § 17072 (1944).

tion that such a conflict does exist. Enforcement of the state statutes results in the formation of groups of competitors to make cost surveys (under statutes permitting them),¹⁴⁴ to suggest price policy, to warn potential violators, and to bring suit against those who will not toe the price=cost line. And yet, as all of the above cases recognize, such action constitutes a form of price-fixing by private agreement. It might be argued that the statutes are a form of *state* action exempt from the Sherman Act under the holding of *Parker v. Brown*,¹⁴⁵ where a state raisin proration program—carefully supervised at all stages by state officials—was upheld on the ground that the Sherman Act applies to *private* restraints alone.¹⁴⁶ But the instant statutes, unlike the one considered in *Parker v. Brown*, represent a form of state action far more subject to private manipulation for private purposes, and might not, therefore, be granted immunity from the Sherman Act.¹⁴⁷

To the extent that such private price-fixing affects interstate commerce—and there can be little doubt that current doctrine gives wide scope to the effect of intra-state activities on interstate commerce¹⁴⁸—it is clearly a *per se* violation of the Sherman Act.¹⁴⁹ And where the necessary effect of a state

144. See note 92 *supra*. Even where enforcement groups do not conduct cost surveys, the Connecticut experience shows that the statutes require enforcement bodies to make them at all effective. See note 126 *supra*.

145. 317 U. S. 341 (1943).

146. *Id.* at 350-2.

147. *Parker v. Brown* may also be distinguished on the ground that the program there considered had the active assistance of federal officials (see Note, 56 YALE L. J. 1265 (1947)), whereas the sales-below-cost statutes enjoy no such federal blessing. But see note 157 *infra*.

For discussion of the effect of *Parker v. Brown* on analogous state statutes—those providing for compulsory resale price maintenance in the liquor industry—see Note, 57 YALE L. J. 459 (1948).

148. *United States v. Darby*, 312 U. S. 100, 118 (1941). And *See United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 120 (1942) ("Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce.")

In the *Western Confectioners* and *New England Food Council* cases, *supra* notes 115, 121, there was no difficulty in showing interstate commerce was involved. In the California anti-trust actions, the fact that the restraints involved were imposed on food products at the end of their interstate journey, in local marketing, was found sufficient to bring them within the Sherman Act, since the quantity of interstate shipments was thereby affected. *United States v. Food & Grocery Bureau of Southern California*, 41 F. Supp. 884 (S.D. Cal. 1941), 43 F. Supp. 966, 972 (S.D. Cal. 1942).

149. Although private activities prohibiting sales below cost vary from the more common types of price-fixing agreement, they are within the scope defined in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), where it was declared that "the placing of a floor under . . . markets [which] obviously reduces the play of the forces of supply and demand" was a price-fixing activity and was illegal *per se*. *Id.* at 167. And it is to be noted that these statutes, unlike analogous resale price maintenance statutes, have not received Congressional blessing in an exemption comparable to the Miller-Tydings Act. See note 3 *supra*.

statute¹⁵⁰ is to bring it into direct conflict with a pronouncement of Congress, the supremacy clause¹⁵¹ permits of but one solution: the state statute must fall.¹⁵²

But countervailing factors may forestall this result. The present Supreme Court is reluctant to invalidate any type of legislative enactment, particularly a state statute regulating economic affairs,¹⁵³ though this reluctance seems to yield to pressing demands to protect the national economy.¹⁵⁴ Aided by the well-established rule that, if any reasonable construction of a statute will render it constitutional, such a construction will be adopted,¹⁵⁵ the Court could validate the statutes. For, although enforcement activities by a group of competitors constitute a "contract, combination, or conspiracy" in contravention of the Sherman Act,¹⁵⁶ the Court could find that such activity by an individual seeking to prevent intentional "injury" or "deception" would not fall within the terms of the Act. Furthermore, since many of the statutes are also (at least by their terms) enforceable by state officials,¹⁵⁷ the Court would, if it desired, have available a second rationale for their validation.¹⁵⁸

150. That the state statute may be examined in terms of its "practical administration" see *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766 (1945). And see the importance attached by Mr. Justice Rutledge, dissenting, to the effects of the statute upheld in *Kotch v. Board of River Port Pilot Comm'rs*, 67 Sup. Ct. 910, 917 (1947), 56 YALE L. J. 1276 (1947); see also Comment, 56 YALE L. J. 1356 (1947).

151. U. S. CONST. Art. VI.

152. *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 154-6 (1942); *Hill v. Florida*, 325 U. S. 538 (1945). See *North American Co. v. SEC*, 327 U. S. 686, 705 (1946); *Savage v. Jones*, 225 U. S. 501, 529 (1912); *Northern Securities Co. v. United States*, 193 U. S. 197, 344-7 (1904).

In *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944), insurance companies subject to state regulatory statutes were found to have conspired in violation of the Sherman Act. The question whether the statutes themselves conflicted with the Act was argued, but the claim of conflict was found to be "exaggerated" (*id.* at 562). Thus, it seems fairly clear that a statute found to encourage private restraints of trade would be considered to be in violation of the Sherman Act.

153. *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943); *Duckworth v. Arkansas*, 314 U. S. 390 (1941); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938). But see Comment, 56 YALE L. J. 1356, 1369-74 (1947).

154. *Rice v. Santa Fe Elevator Corp.*, 67 Sup. Ct. 1146 (1947); *Rice v. Board of Trade of Chicago*, 67 Sup. Ct. 1160 (1947), 56 YALE L. J. 1265 (1947); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

155. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937).

156. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1940).

157. The Montana, Louisiana, and Utah statutes, granting at least concurrent enforcement powers to state commissions, might be so viewed. See notes 103, 112 *supra*.

158. See *Parker v. Brown*, *supra* notes 145-6.

But if the statutes were regarded as state action tending to establish market floors, rather than permission or encouragement for groups of individuals to do so, the question would still remain whether such state action, though not contrary to the Sherman Act, was otherwise prohibited. It is unlikely that the 14th Amendment would stand in the way.

CONCLUSION

The most important expression of the cost protection movement has been found in generalized prohibitions against sales below cost. Such prohibitions, in placing the power of cost definition in private hands, enable trade groups, guided always by a strong economic interest in limiting the play of market forces, to set effective price floors and to lay a ban on *all* types of price cutting,—not merely those where the threat of monopoly exists. Defeated within the NRA and the FTC Trade Practice Conferences once their results were observed, such restraints are now sanctioned by state law and their application may well become more widespread.¹⁵⁹ The sponsorship, provisions, construction and enforcement of these laws demonstrate that their avowed purpose of staving off monopoly is not and will not be served, but that the historic goals of cost protection are well achieved. Under the cloak of their protection, competitors engage in actions directly affecting market prices which, if not justified by their provisions, would offend the anti-trust laws as now construed. If this economic reality can be perceived behind the ostensible goals of these statutes, state cost-protection legislation may possibly be viewed in a future Supreme Court test—already long postponed—as unconstitutional because in direct conflict with laws of the United States. In any event, continued prosecution of private enforcement groups by federal agencies would seem to be required if the ground already lost to anti-competitive forces is to be regained.

RICHARD H. LOVELL†

Nebbia v. New York, 291 U. S. 502, 529 (1934); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937). But it is possible, with expanded notions of what is interstate commerce, see note 148 *supra*, that such state price-fixing might be viewed as a burden on that commerce. Mr. Justice Black's views, *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 316 (1938); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 183 (1940) are not those of the majority, and if, in accommodating state and national interests, the court finds the restraint on interstate commerce sufficiently serious, the statutes might be invalidated. *Freeman v. Hewit*, 329 U. S. 249 (1946); *Morgan v. Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). And see Mr. Justice Jackson concurring in *Duckworth v. Arkansas*, 314 U. S. 390, 400 (1941). *But cf.* *Parker v. Brown*, 317 U. S. 341, 359-68 (1943) (raisin production control program, though affecting interstate commerce, was "appropriate" state regulation).

159. GREYER, *op. cit.* *supra* note 3, at 397, predicted that such "horizontal control devices [might] be merely the stepping stones to larger ventures." And if, as its supporters seem to fear, resale price maintenance is endangered by the possible repeal of the Miller-Tydings Act *supra* note 3, see N. Y. Times, Nov. 14, 1947, p. 35, col. 1, the impetus behind that movement might be transferred to sales-below-cost statutes, especially where cost surveys allow percentage mark-ups to be established which are appropriate to the drug trade and others.

† Member, third year class, Yale School of Law.